Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD E. ARMSTRONG, POST-BANKRUPTCY PETITION AND AS A BENEFICIARY OF THE DONALD E. ARMSTRONG FAMILY TRUST AND THE DONALD E. ARMSTRONG CHARITABLE REMAINDER UNITRUST, *Petitioner*

v.

KENNETH A. RUSHTON, AS TRUSTEE OF THE BANKRUPTCY ESTATE OF DONALD E. ARMSTRONG et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

DONALD E. ARMSTRONG, PRO SE INDIVIDUALLY, POST-BANKRUPTCY PETITION AND AS BENEFICIARY OF THE DONALD E. ARMSTRONG FAMILY TRUST AND THE DONALD E. ARMSTRONG CHARITABLE REMAINDER UNITRUST
P.O. Box 1059
Park City, Utah 84060-1059
(435) 649-6477

PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald E. Armstrong, individually and post-bankruptcy-petition and as a beneficiary of the Donald E. Armstrong Family Trust ("Family Trust") and the Donald E. Armstrong Charitable Remainder Unitrust ("Charitable Trust") (collectively the "Trusts") ("Armstrong") respectfully petitions for a writ of certiorari to review four decisions of the Tenth Circuit Court of Appeals.

QUESTIONS PRESENTED

1. **DID THE COURTS DENY ARMSTRONG'S CONSTITUTIONAL RIGHT TO BE HEARD WITH FILING RESTRICTIONS; WHAT IS JUST CAUSE OR EXCUSABLE NEGLECT IN FILING AN ALLEGEDLY UNTIMELY NOTICE OF APPEAL; AND IS F.B.R.P. 8002(C)(1) UNCONSTITUTIONAL IN RELATION TO EXCUSABLE NEGLECT?**

2. **CAN FEDERAL COURTS IMPOSE LIABILITY ON ARMSTRONG FOR UNCONSTITUTIONALLY EXCESSIVE PENALTIES IN A STATE COURT JUDGMENT THAT SPECIFICALLY EXCLUDES LIABILITY AGAINST ARMSTRONG BASED ON A CASE THAT WAS DISMISSED WITH PREJUDICE BASED ON F.R.C.P. 41(A) AND ARE THE PENALTIES UNCONSTITUTIONAL AND UNENFORCEABLE AND NOT ENTITLED TO FULL FAITH AND CREDIT PRINCIPLES?**

3. **Did The Bankruptcy Appellate Panel Abuse Its Discretion In Not Allowing Armstrong's June 6, 2003 Brief To Be Filed And Did The Bap Deny Armstrong's Constitutional Right To Be Heard On The Merits?**

PARTIES TO THE PROCEEDINGS

Kenneth A. Rushton
as Trustee of the Chapter 11
Bankruptcy Estate of Donald E. Armstrong

Steppes Apartments, Ltd.

John L. Feece

Donald E. Armstrong as
Trustee of the Donald E. Armstrong
Family Trust and Donald E. Armstrong
Charitable Remainder Unitrust

Donald E. Armstrong,
Post Bankruptcy Petition
And As Beneficiary of the Donald E. Armstrong
Family Trust and the Donald E. Armstrong
Charitable Remainder Unitrust

United States Trustee

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OPINIONS

The Tenth Circuit Court of Appeals ("Tenth Circuit") decision affirming the dismissal entered on May 27, 2004 in 02-4101. (not reported) (Order is reproduced as App. A. All future reproduced documents shall be referred to as "App. Letter".) The Bankruptcy Appellate Panel of the Tenth Circuit ("BAP") entered its Order of Dismissal on June 4, 2002 in BAP UT 02-011. (App. B) The Bankruptcy Court order approving the Plan of Reorganization in Case 00-26592 entered on January 31, 2002. (App. C)

The Tenth Circuit decision affirming the dismissal entered on May 27, 2004 in 02-4106. (not reported)(App. D) The BAP entered its Order of Dismissal on May 22 2002 in BAP UT-02-038. (App. E)

The Tenth Circuit decision affirming the dismissal entered on May 27, 2004 in 03-4170. (not reported) (App. F) The BAP of the Tenth Circuit entered its Order of Dismissal on June 18, 2003 in BAP UT-03-017. (App. G) The Bankruptcy Court order denying Armstrong the right to pursue Steppes in Case 00-26592 entered on February 10, 2003. (App. H)

The Tenth Circuit decision affirming the dismissal entered on May 27, 2004 in 03-4177. (not reported) (App. I) The BAP of the Tenth Circuit entered its Judgment and Opinion on June 24, 2003 in BAP UT-02-007. *In re Armstrong*, 294 B.R. 344, (10th Cir.BAP 2003) (App. J)

JURISDICTION

The Tenth Circuit decided cases 02-4101, 02-4106, 03-4170 and 03-4177 on May 27, 2004. No petition for rehearing was filed. An extension of time to file the petition for a writ of certiorari was granted to and including October 24, 2004 on August 23, 2004 in Application No. 04A160. The jurisdiction of this Court

is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Constitutional Amendment provides in relevant part: "Congress shall make no law .....to petition the Government for a redress of grievances." *U.S.C.A. Const. Amend. I* (App. K § 1)

The Fifth Constitutional Amendment provides in relevant part: "No person shall be ..... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *U.S.C.A. Const. Amend. V* (App. K § 2)

The Eighth Constitutional Amendment provides in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *U.S.C.A. Const. Amend. VIII* (App. K § 3)

The Fourteenth Constitutional Amendment provides in relevant part: "No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *U.S.C.A. Const. Amend. XIV* (App. K § 4)

STATEMENT

This case is essentially about the Utah federal courts denying Armstrong and/or the Trusts the right to be heard. Most, or all, of these issues are grounded in this concept. The Plan of Reorganization ("Plan") in Utah Bankruptcy 00-26592 ("26592") is directed at enjoining Armstrong and the Trusts' rights to be heard. There was no need for the Plan since the Trustee, Kenneth A. Rushton ("Rushton") never paid any legitimate unsecured creditors one penny. This is not consistent with a bankruptcy trustee's duties to the estate, creditors and the debtor. 11 U.S.C. §§ 704 and § 1106 (App. K §§ 5 and 6)

This Court has consistently upheld the basic due

process issues of jurisdiction, notice and a full and fair opportunity to be heard before an unbiased and impartial tribunal. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("*Mullane*"); and *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("*Lee*"); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568, (1996) ("*BMW*"); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513, (U.S.,2003) ("*State Farm*"); *United States v. Bajakajian*, 524 U.S. 321 (1998) ("*Bajakajian*"); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) ("*Cooper*"); *Apache Corp. v. Moore*, 517 U.S. 1217 (1996) ("Apache"); *Armstrong v. Manzo*, 380 U.S. 545 (1965) ("*Manzo*"); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988) ("*Peralta*").

The Bankruptcy Court and the Tenth Circuit entered and affirmed a litigation injunction ("Injunction") against Armstrong that completely denies Armstrong the constitutional right to access to the courts permanently. *U.S.C.A. Const. Amend. I* This injunction prevents Armstrong and numerous other parties from filing any pleadings relating to numerous individuals, most of which have absolutely no relationship to 26592. Beyond the Injunction, the Tenth Circuit entered filing restrictions preventing Armstrong from filing any further appeals in the Tenth Circuit without paying sanctions in other cases putting additional burdens on Armstrong's constitutional right to access to the courts.

The Confirmation and the Injunction affect numerous parties that had no standing, that were not noticed and where the Bankruptcy Court had no jurisdiction. The various circuit courts have entered differing rulings on the issue of exactly who a bankruptcy court can enjoin and/or who they can release. It is time for this Court to resolve the question of what authority and jurisdiction a bankruptcy court has in relation to injunctions, especially permanent injunctions and releases.

Various courts have upheld injunctions in bankruptcy cases to protect ongoing entities. *In re Dow Corning Corp.*, 280 F.3d 648, (C.A.6 2002) ("*Corning I*") (petition denied at 537 U.S. 816, 2002) There are split decisions among the circuits on permanent injunctions in bankruptcy estates.

Steppes Apartments, Ltd. ("Steppes") plays a major role in this horror. Steppes obtained a Modified Judgment for over $2.8M in Texas usury forfeitures and penalties in relation to zero actual damages against the Trusts on May 8, 1997. (App. L) The Modified Judgment specifically excludes liability against Armstrong. (App. L at ¶¶ 9, 10, 12 and 13) Steppes filed an action in Utah in case2:97CV0663 ("663") in 1997 claiming fraudulent transfers and filed lis pendens' on 10 Utah properties. Steppes' filed a proof of claim in 26592 based on the Modified Judgment and alleged fraudulent transfers Steppes presented in 663. Only one of the affected properties was ever owned by the Trusts. Judge Clark ruled that Steppes' lis pendens were wrongful liens on September 7, 2001 in adversary proceeding 99-2218. (App. M and N) Armstrong and Rushton argued the penalties in the Modified Judgment are unconstitutionally excessive, not entitled to full faith and credit and that no penalties could be awarded without an award for actual damages. Steppes had no standing in 26592 since the penalties were unconstitutionally excessive and Armstrong is excluded from liability. The BAP held that Armstrong is liable on the Modified Judgment despite the Modified Judgment specifically excluding liability against Armstrong. Armstrong asserts the federal courts had no jurisdiction to make Armstrong liable on a state court judgment based on the *Rooker-Feldman Doctrine. District of Columbia Court of Appeals v. Feldman*, 103 S.Ct. 1303 (1983); *Rooker v. Fidelity Trust Co.* 44 S.Ct. 149 (1923)

Steppes, Rushton and the Bankruptcy Court relied

on interlocutory orders in cases Steppes dismissed with prejudice based on F.R.C.P. 41(a). In Steppes' Memorandum in Support of Motion to Clarify and/or Reconsider Order Modifying Plan of Reorganization, Background ¶5, Steppes states: "Subsequent to the entry of the Litigation Injunction, the parties took action to substantially consummate the Plan of Reorganization, including the disbursement of money and the dismissal of several lawsuits *with prejudice*." There was an interlocutory summary judgment order and an oral ruling in 663 against Armstrong. The courts gave preclusive effect to these interlocutory orders despite the dismissal with prejudice in Armstrong's favor. Res judicata requires final and appealable orders. Courts are now eroding that concept to give effect to interlocutory orders that were not appealable denying a party the right to appellate review.

There was no need for any plan of reorganization in 26592 since no distributions were made to legitimate unsecured creditors. Armstrong filed a motion to convert 26592 to Chapter 7 to save millions in legal fees. The Bankruptcy Court denied Armstrong's motion and proceeded with the Plan. Rushton and his professionals charged over $1.8M in fees to approve the Plan that did not pay any unsecured creditors. The sole purpose of the Plan was to implement the Injunction for the benefit of Steppes while providing no benefit to the estate or creditors.

The courts held that Armstrong's appeal of the Plan was untimtely despite the Utah Federal Courts closing during the 2002 Winter Olympics. The courts also refused to accept Armstrong's June 6, 2003 brief in BAP Appeal 03-017 upon a very limited 5 day notice by mail over the Memorial Day weekend leaving Armstrong with only two days notice. This Court favors decisions on the merits. There is just cause and/or excusable neglect for the courts to hear Armstrong's appeals on the merits especially where the courts' orders were entered without due process, notice

and jurisdiction.

BACKGROUND

All this litigation stems from a case originating in Texas. Steppes purchased the Steppes Apartments from the Trusts on September 29, 1994 executing notes and deeds of trust in favor of the Trusts for 90% of the purchase price along with a personal guaranty from John L. Feece ("Feece") in favor of the Trusts. (App. L)

The Modified Judgment was entered on May 8, 1997 that specifically excludes liability against Armstrong, individually, contains zero actual damages, but awards over $2.8M in exemplary damages. Steppes filed 663 against the Family Trust, Armstrong and Mountain Pacific Ventures, Inc. ("MPV") asserting the same claims Steppes and Feece litigated and/or could have litigated in Texas. This is the very first time Armstrong, individually, was named.

Steppes filed lis pendens' on all property Armstrong, or any entity Armstrong had any interest in, with the specific provision that the lis pendens' also affected any property Armstrong, the Family Trust or MPV could acquire in the future. (App. N) These lis pendens caused Willow Brook Cottages, L.L.C., MPV and Armstrong, individually, to declare bankruptcy. Armstrong filed for protection under Chapter 11 on March 10, 2000 in what became 26592.

Steppes filed a proof of claim in 26592 based on the claims in 663. Armstrong AND Rushton objected to Steppes' claim but that objection was never heard. On September 7, 2001, the Honorable Glen E. Clark ruled that Steppes May 6, 1998 lis pendens' were wrongful liens under the Utah Wrongful Lien Act. (App. M and O) Despite Judge Clark's Order, Steppes and Feece still refused to release their May 6, 1998 wrongful liens and Armstrong still cannot obtain a hearing on Armstrong's post-bankruptcy-petition property rights.

Steppes' wrongful liens affect Armstrong post-bankruptcy-petition and as a Beneficiary of the Trusts ("Beneficiaries"), and deny Armstrong, in all capacities, his Fifth and Fourteenth Amendment property rights. *U.S.C.A. Const. Amend. V and XIV* (App. K §§ 2 & 4)

The Beneficiaries, including Armstrong, have never been provided notice of any kind or given any opportunity to defend themselves as to any of Steppes' these claims and actions. *Mullane*, *Manzo* and *Peralta* Numerous Utah federal judges, Utah and California bankruptcy judges, the Tenth Circuit and Utah State Court judges refuse to provide Armstrong the right to discovery, due process or any hearing on the merits. There is no final judgment on these issues on the merits. Most of these issues warrant a *de novo* review which has never occurred.

Armstrong has lost his reputation, business, financial stability, assets, home, credit rating, career, freedom, right to own property and many other constitutionally protected rights as a result of the various courts denying Armstrong his right to be heard.

Rushton proposed the Plan knowing that Rushton's own fees required all of the estate's assets. Rushton's plan contained the Injunction that is permanent and ongoing. There is no purpose to a permanent injunction since there is no money to pay unsecured creditors. With no ongoing reorganized debtor there is no basis, statute, authority or jurisdiction to maintain a permanent injunction.

The order approving the Plan was entered on January 31, 2002. (App. C) The ten day deadline to file a notice of appeal expired on February 11, 2002. The 2002 Winter Olympics began in Salt Lake City on February 8. In fact, the Olympic Committee and the news media all stressed vehemently for people to stay

away from downtown Salt Lake City especially on the first business day of the Olympics----February 11, 2002. The Utah Federal Courts closed during the Olympics and had reduced hours for filing pleadings (from 9:00 a.m. to 1:00 p.m.). Clearly, the Olympics were important enough to close the Utah courts. Monday, February 11, was the first business day of the Olympics and no one in Utah knew what to expect for traffic in downtown Salt Lake that first day. Armstrong filed his notice of appeal on February 12 at approximately 9:00 a.m. (App. P) The BAP and Tenth Circuit held that Armstrong's notice was untimely despite the Olympics. The Plan did not become effective until July 18, 2002.

Armstrong filed a motion to sue Steppes. The Bankruptcy Court denied the motion and Armstrong timely appealed. The BAP granted Armstrong one extension making the deadline for Armstrong's brief May 22, 2003. Armstrong filed a second request for extension on May 8, 2003. The BAP denied Armstrong's second motion but ordered that Armstrong could file his initial brief apparently on June 4, 2003 in an order dated and mailed on May 28, 2003 that Armstrong did not receive until June 2, 2003—after the Memorial Day holiday. This essentially gave Armstrong two days to file his brief. Armstrong calculated the due date to be June 9, 2003 using the mail rule. F.B.R.P. 9006(f) (APP L §16) Armstrong filed his brief on June 6. The courts held that Armstrong's brief was untimely and dismissed Armstrong's appeal on June 18. Generally courts issue show cause orders prior to dismissing appeals. No show cause order was entered notifying Armstrong the appeal would be dismissed. These may be discretionary issues but when ALL discretionary matters are decided against one pro se party that discretion becomes discriminatory and biased denying the party due process and the constitutional right to be

heard. As of June 18, 2003 the BAP had Armstrong's June 6, 2003 brief and there was no prejudice to the appellees.

REASONS FOR GRANTING THE PETITION

This Court has continually protected the constitutional right to access to the courts. *U.S.C.A. Const. Amend. I* Generally all the questions and issues in this appeal relate to courts denying Armstrong the right to be heard and finding ways to avoid addressing Armstrong's rights and claims on the merits. The courts have done their very best to use all technicalities and discretion to avoid Armstrong's rights. Generally courts favor decisions on the merits but Armstrong has not found any U.S. Supreme Court decisions stating that there is a public policy of addressing claims on the merits. It is time this Court addressed this issue. The Injunction and the various filing restrictions are unconstitutional deprivations of Armstrong's constitutional right to pro se access to the courts. It is important for this Court to write an opinion addressing enjoining pro se parties from appearing in court.

This Court addressed excusable neglect in relation to bankruptcy rules in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) ("Pioneer").* This Court has not applied the excusable neglect standard to bankruptcy notices of appeal based on F.R.B.P 8002(c)(1) but there is no reason to exclude these items. No lower court did any review based on the *Pioneer* factors. While the Code states that bankruptcy courts cannot extend the time to appeal certain orders the Code does not state that excusable neglect does not apply. F.R.B.P. 8002(c)(1) The question is whether excusable neglect and just cause apply to appeals listed in F.R.B.P. 8002(c)(1). This Court stated that the test for excusable neglect is an equitable one and must be reviewed by the

courts. No analysis of any kind was done. The petition should be granted so this Court can address excusable neglect in relation to all bankruptcy appeals and especially relating to the matters listed in F.R.B.P. 8002(c)(1).

The Plan contains the Injunction affecting Armstrong and others permanently. Bankruptcy courts have limited jurisdiction. There are numerous decisions in the circuit courts addressing the limits of bankruptcy court jurisdiction to impose sanctions on non-parties and releasing non-parties. 11 U.S.C.A. § 524(e) The most a court has approved are injunctions to protect the reorganization of an ongoing enterprise. *Corning 1* In the Corning cases there was an ongoing enterprise and ongoing claims. The court held that injunctions may be appropriate to protect reorganizations under certain situations. Congress added § g relating to asbestos cases. In the present case there is no ongoing enterprise and no purpose for permanent injunctions. It is important for this Court to explain the exact limits of bankruptcy court jurisdiction and whether bankruptcy courts can enjoin anyone in liquidation cases. The Tenth Circuit held that § 105(a) does not override § 524(e) and that bankruptcy courts can't release non-debtors. *In re Western Real Estate Fund Inc.*, 922 F.2d 592, 601 (10th Cir. 1990) ("*Western*")

There is an unanswered question relating to the preclusive affect of interlocutory orders in cases that are dismissed according to F.R.C.P. 41(a)(1). The Tenth Circuit and other courts continually rely on interlocutory orders in 663 that Steppes voluntarily dismissed based on F.R.C.P. 41(a)(1). (App. K § 7) Steppes also dismissed other cases based on the same claims implicating the dismissal with prejudice portion of F.R.C.P. 41(a)(1). Several courts are now giving preclusive effect to interlocutory orders even in cases that were dismissed.

This is important to this Court because it causes confusion and unnecessary litigation over issues that became moot with dismissals causing additional petitions. Steppes' dismissals with prejudice resulted in decisions for Armstrong. There can't be interlocutory orders AGAINST Armstrong when the case was resolved (dismissed) in Armstrong's favor. It is important for the Court to finally resolve this question especially in relation to dismissals based on F.R.C.P. 41(a)(1). (App. K § 7)

This Court delivered several opinions relating to the unconstitutionality of excessive punitive damage and penal judgments in recent years. *BMW, State Farm, Bajakajian* and *Cooper* This Court has not specifically addressed these principles in relation to statutory civil penalties. It is necessary for this Court to confirm that the principles laid out in these cases apply to all penalties of all kinds and not just punitive damages.

This Court has applied the *BMW* guideposts that include an evaluation of the ratio of penalties to actual damages or harm caused. In Texas, there is a statute that provides that no exemplary damages can be awarded without an award of actual damages. Tex. Civ. Prac. & Rem. Code § 41.004(a) (App. K § 8) The Texas courts refused to honor their own statute. It would save a great deal of litigation for this Court to state that there cannot be exemplary damages without an award of actual damages. This entire mass of litigation would have been avoided since Steppes was never awarded any actual damages. It is critical that this Court confirm that there can be no statutory penalties, civil penalties, forfeitures or punitive damages without an award of actual damages. The Court could address this issue at the petition level by simply applying *BMW, State Farm, Cooper* and *Bajakajian* to civil and statutory penalties and confirming

that there can be no exemplary damages without an award of actual damages.

In Appeal 02-007 the BAP held that Armstrong is liable on the Texas state Modified Judgment despite the Modified Judgment specifically excluding liability against Armstrong in violation of the *Rooker-Feldman Doctrine*. (App. J) The courts relied on the September 10, 1999 interlocutory summary judgment order in 663 that modified the Modified Judgment. Steppes dismissed 663 based on F.R.C.P. 41(a)(1) with prejudice--- Armstrong "won" and Steppes "lost". The BAP relied on the summary judgment order to allegedly make Armstrong liable on the Modified Judgment even when Steppes dismissed the claims with prejudice. The issues here are a further interpretation of the *Rooker-Feldman Doctrine* and whether interlocutory orders in cases dismissed with prejudice can have any preclusive effect. Armstrong submits that the *Rooker-Feldman Doctrine* prevents any such modification of a state court order and that when a case is dismissed by a plaintiff with prejudice there can be no interlocutory orders having preclusive effect against the defendant. The petition should be granted to confirm the *Rooker-Feldman Doctrine* and address whether interlocutory orders in cases that are dismissed with prejudice by the plaintiff can have any preclusive effect against a Defendant.

The issue in BAP Appeal 03-017 is whether the courts abused their discretion to deny Armstrong the right to be heard and whether the notice provided by the BAP satisfied due process giving Armstrong only two days to file his brief or face dismissal and whether Armstrong's June 6, 2003 brief satisfies a brief deadline of June 4, 2003. Again, there was no review of the excusable neglect factors. The petition should be granted so this Court can address the importance of determining cases on the merits rather than dismissing cases based on

strict adherences to deadlines and rules with all discretion against pro se parties.

ISSUES PRESENTED

1. **DID THE COURTS DENY ARMSTRONG'S CONSTITUTIONAL RIGHT TO BE HEARD WITH FILING RESTRICTIONS; WHAT IS JUST CAUSE OR EXCUSABLE NEGLECT IN FILING AN ALLEGEDLY UNTIMELY NOTICE OF APPEAL; AND IS F.B.R.P. 8002(C)(1) UNCONSTITUTIONAL IN RELATION TO EXCUSABLE NEGLECT?**

The Plan contains the Injunction that prevents Armstrong from filing any action relating to numerous parties releasing these non-debtors in violation of 11 U.S.C. § 524(e). The Tenth Circuit entered additional filing restrictions against Armstrong requiring Armstrong to pay sanctions in Appeal 02-4106 before considering any other appeal. (App. D at 41a) These restrictions are permanent having prospective effect. Rushton and Steppes continue to benefit by these restrictions and yet the Tenth Circuit refuses to consider the merits of Armstrong's appeals. On September 3, 2004, Judge Cornish modified the Injunction continuing its enforcement and adding additional limitations.

Richard S. deOnativia ("deOnativia") filed a complaint against Armstrong in 2001 pursuing pre-bankruptcy petition claims despite the automatic stay and Armstrong's discharge. Armstrong has been presenting his rights under the automatic stay and discharge for over three years to no avail. Numerous courts have refused to consider Armstrong's rights while deOnativia steals Armstrong's money every month. Armstrong finally obtained enough funds to hire attorneys in this one case and suddenly the federal court is proceeding where the court would never even grant pro se Armstrong a hearing on the merits. This is blatant proof of the prejudice and bias against parties representing themselves.

Bankruptcy courts are courts of limited jurisdiction. "The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995) The test for bankruptcy jurisdiction is whether the action can have an effect on the bankruptcy estate. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir.1984) Bankruptcy courts and/or parties cannot create their own jurisdiction. *Matter of FedPak Systems, Inc.*, 80 F.3d 207, 215 (C.A.7 1996); *In re AAPC, Inc.*, 277 B.R. 785, (Bankr.D.Utah 2002) However, in 26592, Judge Boulden entered an order that specifically affected the Trusts and the Beneficiaries without notice and a full and fair opportunity to be heard. The courts exceeded their jurisdiction in enjoining Armstrong, the Trusts and others. It is critical that this Court grant this petition to address the limits of bankruptcy court jurisdiction especially in relation to parties that were never noticed.

The Injunction protects numerous parties that never contributed to 26592 or have anything to do with 26592. No litigation between Armstrong, the Trusts or the Beneficiaries against Steppes or the other protected parties will have any effect on 26592. No unsecured creditors will ever be paid one penny. There was no bankruptcy purpose for the Plan or the Injunction. The only possible effect is the complications that Rushton and the Bankruptcy Court created without jurisdiction or legal authority. *In re Lacy*, 183 B.R. 890, 895, (Bankr.D.Colo. 1995) (citing *Matter of Holly's, Inc.*, 172 B.R. 545 (Bankr.W.D.Mich. 1994)) and *Western* The BAP already found that Judge Cornish acted without jurisdiction in entering criminal sanctions against Armstrong.[1] It is critical that this Court address who

[1] *In re Armstrong*, 304 B.R. 432, 438 (10th Cir.BAP 2004) "We do not need to address this constitutional issue here, because the Utah

bankruptcy courts have jurisdiction over to protect or enjoin.

Armstrong is entitled to appellate review especially of the Injunction. The issue of bankruptcy court jurisdiction and authority to enjoin parties is ripe for this Court's consideration and determination. Neither 11 U.S.C. §§ 105 nor 524(e) (C §§ 9 and 10) allow for enjoining debtors and releasing non-debtors, non-creditors and non-parties.

The courts denied Armstrong the right to appeal the Plan stating that Armstrong's 9:07 a.m. February 12, 2002 notice of appeal was untimely. (App. A at 2a) The Plan was confirmed on January 31, 2002. The Olympics began in Salt Lake on February 8. The media and Olympic Committee requested that all people avoid downtown Salt Lake during the Olympics. February 11 was the first business day of the Olympics. This Court addressed excusable neglect in Pioneer creating an elastic standard. *Pioneer* F.B.R.P. 8002(c)(1) provides that bankruptcy courts cannot grant motions to extend the time to file certain orders including orders granting plans of reorganization. This Court has not addressed whether excusable neglect applies to appeals of orders included in F.B.R.P. 8002(c)(1) and Armstrong cannot find any circuit court decisions on this issue. Armstrong suggests that F.B.R.P. 8002(c)(1) is unconstitutional since it denies parties the right to file appeals based on excusable neglect. Courts have generally applied the *Pioneer* tests to most, or all, issues of timeliness including F.R.A.P. 4. All appeals in F.R.A.P. 4 are subject to the *Pioneer* tests. Are orders in F.B.R.P. 8002(c)(1) the only orders where excusable neglect does not apply?

In this situation the Utah federal courts closed during the Olympics illustrating the importance of the

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bankruptcy court did not have the jurisdiction to assess criminal sanctions."

Olympics. Are the Olympics, or any such event where courts actually close, an event warranting a finding of excusable neglect? It seems incomprehensible that the Olympics justified closing the courts but are not sufficient to warrant excusable neglect. The Tenth Circuit stated that the Utah courts were open on February 11. The truth is that the courts were closed but the court clerk's office was open for limited hours of 9:00 a.m. to 1:00 p.m. Since Armstrong filed the Notice at 9:00 a.m. on February 12, the very next minute Armstrong could file the Notice, it is as if Armstrong's Notice was filed at 1:01 p.m. on February 11. Any time courts are closed the time to appeal is extended to the next business day. This is no different. At the very very least Armstrong must not be denied the right to appeal based on the courts being closed.

All of this is especially true since the Plan contains these unconstitutional injunctions and is based on the unconstitutionally excessive penalties in the Modified Judgment and to protect Steppes. The Plan did not become effective until July 18, 2002. **There was NO prejudice to any party for a notice of appeal being filed at 9:07 a.m. on February 12, 2002 versus 1:00 p.m. on February 11, 2002.**

The related issues here are: 1) Does a bankruptcy court have authority under 11 U.S.C. § 105 to release non-debtors despite 11 U.S.C. § 524(e)'s ("524") specific limitations on injunctions? 2) Can a bankruptcy court enter permanent injunctions in a liquidation case and/or once the estate no longer conducts business?

Section 524(e) specifically provides that only actions against a debtor can be released. Section 105(a) provides broad powers to bankruptcy courts. As a general rule, the equitable powers of § 105(a) cannot be used by courts to authorize more extensive relief than a specific provision of the Code. *Norwest Bank*

Worthington v. Ahlers, 485 U.S. 197, 206 (1988) There is a serious dispute between the circuits. The Second, Third, Fourth, Sixth and Seventh Circuits support broad-based injunctions to protect ongoing businesses. *Corning I*; *In re Continental Airlines*, 203 F.3d 203 (3rd Cir. 2000); *In re Specialty Equipment Co. Inc.*, 3 F.3d 1043 (7th Cir. 1993); *In re Drexel Burnham Lambert Group Inc.*, 960 F.2d 285 (2nd Cir. 1992); *In re A.H. Robins Co. Inc.*, 880 F.2d 694 (4th Cir. 1989) The Ninth and Tenth Circuits hold that § 105(a) does not override § 524(e). *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995) *(petition denied* 517 U.S. 1243 (1996)); *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995); and *Western*

The Tenth Circuit ignored its own rulings in releasing non-debtors. *Western* This is significant in that, once again, courts will go to any length to avoid Armstrong's pro se claims and rights.

In this situation, the injunction is against the debtor Armstrong and other parties that are not parties in interest, have never been noticed and where the bankruptcy court has no jurisdiction. "Notice, after all, is the cornerstone underpinning bankruptcy procedure." *In re Savage Industries, Inc.*, 43 F.3d 714, 720 (1st Cir.1994); *In re Hexcel Corp.*, 239 B.R. 564, 567 (N.D.Cal.1999). Rushton never noticed the Trusts or the Beneficiaries and yet the courts held the Trusts and the Beneficiaries are bound by the Settlement and Injunction. This is clearly unconstitutional. *Mullane, Lee* and *Manzo* Clearly, Rushton knew how to notice the Trusts and the Beneficiaries yet Rushton chose not to. This Court already held that beneficiaries that are known must be noticed. *Mullane* The lower courts all ignored *Mullane* and entered injunctions against parties that were never noticed. (App. C at 21a-24a, 30a-32a and App. D at 41a.) Additionally, the Injunction specifically benefits a long list of parties that have no interest in 26592 and have

never contributed to 26592. In fact, most of the parties protected by the Injunction caused the bankruptcy and now want the bankruptcy court to protect them for what they have done. This is clearly not the purpose of §§ 105 or 524.

The Sixth Circuit established tests to evaluate whether injunctions are appropriate stating they are only appropriate in "unusual circumstances". *Corning 1* at 658 There is no room to provide a detailed analysis of these tests here. Suffice it to say that the protected parties here did not contribute anything to 26592; the parties enjoined were not parties, not noticed and were not aligned with the debtor or creditors; and the Injunction has no effect on the creditors or the debtor.

Under §§ 105(a) and or 524(e), the bankruptcy court has no jurisdiction to enter injunctions that protect parties completely unrelated to the case or to enjoin non-parties that are not parties in interest. Armstrong suggests that this issue is so basic and fundamental that it warrants this Court's consideration. It is up to this Court to address this issue and confirm the exact limits of bankruptcy court jurisdiction, especially in relation to injunctions and especially when there is no relation to the bankruptcy case, on non-party rights affected by settlements in which they did not participate or consent—including in a bankruptcy proceeding.

There is a significant division between the circuits relating to whether the general statute § 105(a) takes precedence over the specific statute § 524(e). The general rule is that a specific statute supersedes a general statute. *Western* at 601 Section 524(e) is very specific that non-debtors cannot be released. Congress amended Section 524 in 1994 adding subsection g providing for one specific example where a bankruptcy court does have authority to release non-debtors in asbestos cases. This specific amendment illustrates that Congress did not

create any other exceptions to § 524(e). Bankruptcy courts are using § 105(a) to override other clear sections of the Code. Based on this reasoning, bankruptcy courts can use Section 105(a) to do whatever they want regardless of the Code or jurisdiction. There is no basis in the Code to enter a permanent injunction that extends after the estate is closed to enjoin a debtor and protect non-parties. In all the cases where circuit courts have allowed injunctions it was to protect parties directly related to, and liable for, the debtor and that contributed financially to the reorganization. In this situation the parties released in the Plan have no relationship to the debtor, did nothing to contribute to the Plan and, in fact, caused the 26592 bankruptcy by filing lis pendens that Judge Clark called a pre-judgment writ of attachment without the protections of due process. (App. O) The real purpose of the Injunction is to protect Steppes and related parties from claims for filing wrongful liens and wrongful bankruptcy claims based on unconstitutionally excessive penalties. (App. L)

It is time for this Court to resolve the differences between the circuits. Clearly there is a major dispute between some courts using Section 105(a) to completely ignore Congress' intent in Section 524(e).

It is critical that this Court grant the petition to hold specifically that the excusable neglect standard as set out in *Pioneer* applies to appeals in F.B.R.P. 8002(c)(1) and to address the unconstitutionality of broad injunctions entered without notice, jurisdiction or legal authority.

2. CAN FEDERAL COURTS IMPOSE LIABILITY ON ARMSTRONG FOR UNCONSTITUTIONALLY EXCESSIVE PENALTIES IN A STATE COURT JUDGMENT THAT SPECIFICALLY EXCLUDES LIABILITY AGAINST ARMSTRONG BASED ON A CASE THAT WAS DISMISSED WITH PREJUDICE BASED ON F.R.C.P. 41(A) AND ARE THE

PENALTIES UNCONSTITUTIONAL AND UNENFORCEABLE AND NOT ENTITLED TO FULL FAITH AND CREDIT PRINCIPLES?

All of this litigation is based on Steppes' pursuit of over $2.8M in statutory and common law forfeitures and penalties in the Modified Judgment where Steppes was awarded zero actual damages. (App. L) No court has ever reviewed the unconstitutionality of these forfeitures and penalties especially based on a *de novo* review. *Cooper* and *Bajakajian* Steppes' claim was allegedly based on collecting these unconstitutional forfeitures and penalties. Steppes was able to obtain a settlement that allowed Steppes to continue to pursue these unconstitutionally excessive penalties against Armstrong and the Trusts while Armstrong and the Trusts were enjoined from presenting their claims or even defending themselves. (App. C) Armstrong was not a party to the Texas Litigation and did not, and could not, waive any right to present these defenses. *Armstrong v. Steppes Apartments, Ltd.* 57 S.W.3d 37, 40 Fn. 1 (Tex.App.-Fort Worth,2001)

The lower courts stated that Armstrong is liable on the Modified Judgment based on interlocutory rulings in 663 against Armstrong even though Steppes dismissed 663 with prejudice in Armstrong's favor. (App. J at 81a) There can't be any rulings against Armstrong in a case that was dismissed with prejudice in Armstrong's favor. This is an extreme situation and distortion of preclusion principles. In addition, the Modified Judgment is a state court judgment where federal courts have no jurisdiction to enter orders "inextricably intertwined" with, modifying or affecting state court judgments. *Rooker-Feldman Doctrine* Clearly, for these federal courts to make Armstrong liable on a state court judgment specifically excludes liability against Armstrong is modifying the Modified Judgment.

Interlocutory orders were entered in 663 that Steppes voluntarily dismissed based on F.R.C.P. 41(a)(1) and Steppes dismissed other cases raising the same claims. Steppes' voluntary dismissal was "with prejudice" against Steppes and in Armstrong's favor. *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2455 (1990) Steppes, Rushton and the Bankruptcy Court rely on these interlocutory orders for preclusive effect against Armstrong. This Court has never addressed the preclusive effect of interlocutory orders in favor of a plaintiff that voluntarily dismisses a case with prejudice.

The general rule relating to the preclusive effect of prior orders in a dismissed case is that the prior orders have no preclusive effect. *Effect of Nonsuit, Dismissal, or Discontinuance of Action on Previous Orders*, 11 A.L.R.2d 1407, § 3, 6 (citing numerous cases for this proposition) *Winchester Homes, Inc. v. Osmose Wood Preserving, Inc.*, 37 F.3d 1053, 1058 (C.A.4,1994)

The interlocutory orders were never appealable denying Armstrong the right to appellate review. Armstrong asserts that Steppes gave up any benefit from the interlocutory orders by voluntarily dismissing 663. There are two important issues: 1) whether interlocutory orders are entitled to preclusive effect when a case is dismissed; and 2) whether any order is entitled to preclusive effect if the losing party does not have the opportunity to appeal the order. Armstrong submits that to give preclusive effect to an interlocutory order without the ability to appeal is an unconstitutional deprivation of a party's right to appeal and be heard. It is critical that this Court answer these questions.

Steppes claims that the Trusts waived these constitutional arguments by not presenting them at the August 1996 trial. Armstrong was never named or noticed that Armstrong's individual rights could be affected by the Texas Litigation. Waiver is the

intentional relinquishment of a known right. ***United States v. Olano*****, 507 U.S. 725, 733, (1993) (quoting** ***Johnson v. Zerbst*****, 304 U.S. 458, 464, (1938)). Brief for United States as Amicus Curiae 7, n. 5 Since Armstrong was not a party in the Texas Litigation Armstrong could not have intentionally relinquished any right. Armstrong remains entitled to a de novo review of the unconstitutionally excessive penalties.**

This Court addressed the unconstitutionality of penalties (punitive damages) several times. *BMW* and *State Farm* This Court upheld the *BMW* tests in *State Farm* and ruled courts cannot punish parties for being "unsavory characters". *State Farm* at 1523 This Court addressed the unconstitutionality of excessive penalties based on the Eighth Amendment in *Bajakajian.* This Court has not specifically applied *BMW*, *State Farm, Cooper* and *Bajakajian* to statutory or common law civil penalties and forfeitures. Forfeitures were addressed in *Bajakajian.* These cases support an application of these principles to statutory or common law civil penalties. There is no reason that these principles should not apply to statutory or common law civil penalties and forfeitures. It is important for this Court to address this.

Armstrong will present a comprehensive analysis of the tests and reasons supporting Armstrong's contentions in the brief if the Court grants the petition. The *BMW* tests are: the degree of reprehensibility; the disparity between the harm or potential harm compared to the penalties; and the difference between the penalties and the civil penalties authorized or imposed in comparable cases. *BMW* at 1598

The Trusts' actions were to comply with a court order by providing a settlement offer and spreadsheets with the court's promise of immunity and threat of incarceration. These actions are not reprehensible. This test fails. The ratio of penalties to actual damages is

infinite ($2.8M to zero) and incomparable. Many states, including Texas, now specifically hold that no exemplary damages can be awarded without an award of actual damages. (App. K § 11) Steppes was not awarded any actual damages. This test fails. Usury is a misdemeanor in Texas warranting up to a $1,000.00 penalty. Tex. Fin. Code. Ann. § 305.001 (App. K § 12) There are two Trusts so the maximum penalty was $2,000.00 compared to over $2.8M in penalties. This test fails. All three *BMW* tests fail.

Armstrong was not a party to the Texas Litigation and could not, and did not, do anything to warrant any penalties. If Armstrong had done anything reprehensible Steppes had the duty to name Armstrong in Texas. By not naming Armstrong in Texas and by amending the judgment to specifically exclude liability against Armstrong, Steppes intentionally relinquished the right to pursue Armstrong for the Modified Judgment.

Numerous lower courts have evaluated penalties in relation to net worth while this Court hasn't. In this case, the $2.8M in penalties are over double the entire net worth of the Charitable Trust and at least 40% of the alleged net worth of the Family Trust. There is evidence in the records of these amounts and the Trusts and Armstrong never had any opportunity to challenge the penalties. The first time the amounts of the excessive penalties were presented was in the judgment entered after the August 1996 trial. The amount of the penalties was not presented at trial. Punishment is meant to punish not destroy. *Browning-Ferris Industries of Vermont, Inc. v. Kelco*, 109 S.Ct. 2909, 2926 (1989) These penalties destroyed the Trusts and Armstrong. Steppes has been successful in destroying the Trusts and Armstrong so they could not defend themselves or respond. *E.E.O.C. v. HBE Corp.* 135 F.3d 543, 557 (C.A.8 1998) (Penalties of 5% of net worth excessive); *Sierra Club*

Foundation v. Graham, 85 Cal.Rptr.2d 726, 743 (Cal.App. 1 Dist.,1999) (noting general 10% of net worth limit); and (more cases will be presented in any brief).

Forfeitures and penalties are to be reviewed *de novo*. *Cooper* at 1685 and *Bajakajian* at 2037 Statutory and common law civil penalties must be reviewed *de novo*. There has NEVER been a *de novo* review of these penalties. Armstrong is entitled to this *de novo* review since Armstrong was not a party to the Texas Litigation. It is critical that this Court grant this petition and review these penalties *de novo* and vacate the penalties as they relate to 26592 and Armstrong.

These issues remain relevant and ripe because these penalties are penal in nature; not entitled to full faith and credit and still affect Armstrong today. (App. J at 81a) *State Farm* at 1522 (referring to *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States")) The Settlement specifically provides that the penalties remain effective against the Trusts and Armstrong despite Armstrong's bankruptcy discharge.

It is critical that this Court grant this petition to: 1) apply the *BMW* and *State Farm* tests to civil penalties and forfeitures and confirm that penal judgments are not entitled to full faith and credit; (*State Farm* at 1522) 2) insure that civil penalties are reviewed *de novo*; 3) tell the courts of this country that they cannot punish parties with unconstitutionally excessive penalties of any kind; 4) to enter a decision that no penalties can be awarded in the absence of actual damages; 5) to confirm that the *Rooker-Feldman Doctrine* precludes jurisdiction for federal courts to alter state court judgments; and 6) to hold that interlocutory orders are not entitled to

preclusive effect especially when the plaintiff dismissed the case with prejudice in the defendant's favor.

The *Huntington v. Attrill, 146 U.S. 657, 664 (1892)("Attrill")* case is over 100 years old. The *Attrill* case is often quoted as stating that penalties *in the international sense* are not entitled to full faith and credit. Numerous courts have used this distinction of "in the international sense" to not apply *Attrill* to obvious penalties. The interpretation and application of *in the international sense* has created confusion. It is critical that this Court clarify *in the international sense* or merely clarify that penal judgments are not entitled to full faith and credit eliminating the *in the international sense* language. Steppes argued continually that the Texas usury statutes were not penalties that the "executive of the state" could pardon. *Attrill* at 667-669 There are almost no penalties in this day and age that can be pardoned by the head of a state. This particular phrase, *in the international sense,* is used to complicate the question of whether a judgment is penal or not and whether it is entitled to full faith and credit or not.

This Court addressed the concept ~~of penal~~ repeatedly but not specifically in relation to full faith and credit. There are numerous definitions of penal. Surely the $2.8M in Texas usury penalties is punishment and in fact, the Texas Supreme Court has labeled them penal. *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473 (Tex. 1988) ("The penalty in usury cases given to the "usuree" is a boon or a windfall which he is allowed to receive as a punishment to the usurious lender, not as interest for the use of the borrower's money.") Yet, despite this declaration by the Texas courts, Steppes argues that the penalties in the Modified Judgment are entitled to full faith and credit because they are not penal *in the international sense* and cannot be pardoned. This additional language in *Attrill* continues to confuse this

issue. *Testa v. Katt*, 67 S.Ct. 810, 812 (1947) (considering federal penalties v. state penalties) It is only this Court that can answer this question. Armstrong submits that it is critical that this Court update the definition of the penal exception to full faith and credit to eliminate the terms *in the international sense* and *that can be pardoned.* Penalties are either penal or not. The $2.8M in penalties are clearly penal as confirmed by the Texas Supreme Court and not entitled to full faith and credit against Armstrong.

This Court is very familiar with the *BMW* and *State Farm* concepts. Armstrong merely refers the Court to the Court's own extensive opinions on these matters. This situation is the perfect opportunity to address the *BMW* tests in relation to excessive civil penalties and forfeitures where over $2.8M in penalties and forfeitures were assessed in relation to zero actual damages created through the judicial process and court ordered settlement documents with the court's promise of immunity. To punish any party for complying with court orders with the promise of immunity and threat of incarceration is ludicrous but to punish a charitable trust is abominable.

Here are five very important issues this Court should address in this case: 1) that *BMW* applies to civil penalties and forfeitures; 2) that no penalties can be awarded without an award of actual damages (there is no purpose in punishing anyone and taking the precious time of the legal system when there are no damages); 3) to update and clarify the definition of penal judgments that are not entitled to full faith and credit; 4) that interlocutory orders are not entitled to preclusive effect; and 5) that cases dismissed with prejudice by a plaintiff based on F.R.C.P. 41(a) cannot have preclusive effect of any kind against the defendant. It is critical that this Court address these questions.

3. **DID THE BANKRUPTCY APPELLATE PANEL ABUSE ITS DISCRETION IN NOT ALLOWING ARMSTRONG'S JUNE 6, 2003 BRIEF TO BE FILED AND DID THE BAP DENY ARMSTRONG'S CONSTITUTIONAL RIGHT TO BE HEARD ON THE MERITS?**

Courts favor decisions on the merits and disfavor avoiding the merits based on technical and procedural matters. To make a long story short, Armstrong obtained an extension of time to file the initial brief in Appeal 03-017 so that the initial brief was due on May 22, 2003. Armstrong filed a second motion for extension of time on May 8. On May 28 the BAP denied Armstrong's second motion for extension of time but gave Armstrong five days to file the initial brief. The BAP calculated the due date to be June 4. Armstrong did not receive the May 28 order until June 2. The appellees apparently received the order on May 28 by fax or other electronic means creating an disadvantage over Armstrong.

Armstrong filed his initial brief on June 6, within 4 days of receiving the May 28 order. Armstrong believed the 3 day mail rule applied. F.B.R.P. 9006(f) made effective by 10th Circuit BAP L.R. 8018-10(a) The May 28 order is clearly an order or notice with a time to comply. The May 28 order was mailed to Armstrong and did not arrive for 5 days because of Memorial Day. At the very least, these rules are vague and ambiguous.

F.B.R.P. 9006(f) is unclear compromising Armstrong's rights. Armstrong's brief was filed on June 6 which is prior to the deadline, including the 3 day mail rule, of June 9. The May 28 order only provided Armstrong two days notice. Surely the BAP knew that Armstrong would not receive the May 28 order until after June 1 because of Memorial Day. Clearly, and for all the same reasons argued above on excusable neglect, Armstrong was denied due process and notice by the

May 28 order. Alternatively, there is no prejudice for Armstrong's brief being filed on June 6 rather than June 4. The time for filing a brief is not jurisdictional. It is clearly an abuse of discretion and a denial of Armstrong's constitutional right to be heard to deny Armstrong the right to be heard on the merits based on these facts.

Armstrong refers the Court to the legal argument in Issue 1 in relation to excusable neglect and due process rather than repeat the arguments here. The Court could grant review of Issues 1 and 3 as one question or section since they both relate to the same critical issues.

It is critical this Court address the constitutionality of interpreting Rule F.B.R.P. 9006(f) to not apply to procedural orders in an appeal when there is nothing in the rule even hinting that the rule did not apply to such orders. It is critical to also consider excusable neglect and the timeliness of briefs filed within two days of a deadline noticed with only two days to respond. This is an unanswered question requiring this Court's attention.

CONCLUSION

The law is to apply equally to everyone including allegedly unsavory pro se parties. *State Farm* at 1523 Courts cannot deny parties rights for being "unsavory" as these courts have done to Armstrong relentlessly. This Court has consistently upheld the rights of all types of parties including prisoners, rapists, murderers, terrorists and criminals. This Court must uphold the rights of pro se parties, such as Armstrong, as well. If this Court will protect all parties **except** normal citizens such as pro se Armstrong, then the Constitution is failing. These issues certainly merit this Court's attention to insure, once again, that all parties are entitled to the law, notice, due process and all that it provides. *Mullane, Peralta, State Farm, BMW, Manzo* etc.

The real issue, in all these questions, is how the lower courts ignored clear law and this Court's decisions to find ways to rule against Armstrong and enjoin Armstrong and others without jurisdiction, authority or notice. This is a repeating theme throughout all these proceedings. Entering the Injunction protecting Steppes from Armstrong, the Trusts and the Beneficiaries is a blatant violation of the Code where the Court had no jurisdiction. (App. K § 10) It is critical that this Court address these issues and clarify the law. This issue involves due process, notice, absence of jurisdiction, violations of the Bankruptcy Code and other violations. The Injunction is merely for Steppes benefit when Steppes should not have even filed a claim.

It is time that this Court addressed bankruptcy court authority and jurisdiction in relation to permanent injunctions and releases, who they can affect, who they can protect and for how long they can stay in effect. 11 U.S. C. § 105(a) and 524(e)

There is an open question as to the effect of interlocutory orders in dismissed cases. The Utah courts have found ways to apply preclusion principles against Armstrong from interlocutory orders in cases that were dismissed with prejudice in Armstrong's favor. There can't be rulings against Armstrong in cases that were dismissed with prejudice in Armstrong's favor. By definition, a dismissal with prejudice against a plaintiff is a "loss" against the plaintiff on all of the plaintiff's claims and cannot be rulings against the defendant at the same time. This issue requires this Court's attention.

It is critical that this Court apply the *BMW, State Farm, Cooper* and *Bajakajian* principles to statutory forfeitures and civil penalties and for the Court to hold that there simply cannot be any exemplary damages or punishment when the defendant caused no harm. This is relevant here because the Injunction and the Plan revolve

around Steppes while Steppes is not entitled to any relief or consideration since the $2.8M in penalties are unconstitutionally excessive. None of this horror of litigation ever would have occurred if courts had followed these principles—as this Court has continually commanded.

All parties are entitled to notice, due process, discovery and a full and fair opportunity to be heard regardless of their religion, age, sex, political associations, race, status, personal relationships, and representing themselves in court etc. It is clear discrimination for the courts to deny parties representing themselves the right to access to the courts. Even pro se parties are entitled to constitutional access to the courts without additional infringements and burdens. This Court has continually upheld due process rights and matters. It is necessary for this Court to once again apply the constitution strictly for all people. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2648 (U.S.,2004) (referring to numerous other Supreme Court decisions)

The issues surrounding the unauthorized injunctions are now pending in four more lower court appeals and will continue to move through the courts to this Court over the years until this Court addresses them.

These important questions require this Court's attention and direction. The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

Donald E. Armstrong, pro se
PO Box 1059
Park City, UT 84060-1059
(435) 649-6477
October 22, 2004

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

F I L E D
United States Court of Appeals Tenth Circuit
MAY 27 2004
PATRICK FISHER
Clerk

In re: DONALD E. ARMSTRONG, Debtor.	
DONALD E. ARMSTRONG, Appellant, v. KENNETH A. RUSHTON, Trustee; STEPPES APARTMENTS, LTD.; STEVEN R. BAILEY, Trustee; UNITED STATES TRUSTEE, Appellees.	No. 02-4101 (BAP No. UT-02-011) (BAP)

ORDER AND JUDGMENT*

Before McCONNELL, ANDERSON, and BALDOCK, Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In this appeal, debtor-appellant Donald E. Armstrong appeals an order of the Bankruptcy Appellate Panel (BAP) dismissing his appeal from an order of the bankruptcy court that confirmed a reorganization plan in Armstrong's Chapter 11 case. We dismiss this appeal.

As the BAP noted, Fed. R. Bankr. P. 8002(a) requires an appellant to file a notice of appeal within ten days of the entry of the order appealed from. The bankruptcy court order confirming the plan was entered on January 31, 2002; Armstrong's notice of appeal, however, was not filed until February 12, 2002, one day after the filing deadline. The bankruptcy court was open and accessible on Monday, February 11, 2002.

After the time for appeal had lapsed, Armstrong attempted to get an extension of time to appeal under Rule 8002(c) from the bankruptcy court, but his request was denied. In the absence of an extension of time to file the notice of appeal, the untimely notice did not confer jurisdiction on the BAP to adjudicate the matter. *Deyhimy v. Rupp (In re Herwit)*, 970 F.2d 709, 710 (10th Cir. 1992). The BAP properly dismissed the appeal for lack of jurisdiction as do we.

Armstrong has filed supplemental authority in the form of two decisions from the BAP holding that certain sanctions imposed by the bankruptcy court for criminal contempt exceeded that court's jurisdiction. Those decisions have no relevance in this appeal and do not undermine the general jurisdiction of the bankruptcy court over the Armstrong bankruptcy matters.

Because this court finds Armstrong's allegation of poverty to be untrue, his motion to proceed on appeal without prepayment of costs or fees is DENIED, and Armstrong is directed to make immediate payment of the balance of his appellate filing fee. Armstrong's motion to file a supplemental appendix and to include the pleadings and appendix from appeal No. 02-4106 is DENIED. Appellee Rushton's motion to strike Armstrong's opening brief and dismiss the appeal because the brief does not comply with this circuit's rules is DENIED.

This appeal is DISMISSED. The mandate shall issue forthwith.

Entered for the Court

Bobby R. Baldock
Circuit Judge

APPENDIX B
UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

In re: DONALD E. ARMSTRONG, Debtor.	(BAP No. UT-02-011)
DONALD E. ARMSTRONG, Appellant, v. KENNETH A. RUSHTON, Trustee; STEPPES APARTMENTS, LTD.; STEVEN R. BAILEY, Trustee; UNITED STATES TRUSTEE, Appellees.	Bankr. No. 00B-26592 Chapter 11 ORDER OF DISMISSAL June 4, 2002

Before PUSATERI, BOHANON, and MICHAEL, Bankruptcy Judges.

On February 19, 2002, this Court entered an Order to Show Cause Why Appeal Should Not Be Dismissed for Lack of Jurisdiction ("OSC"), because the Appellant filed a Notice of Appeal more than 10 days after the entry of the order appealed. *See* Fed. R. Bankr. P. 8002(a). The Appellant timely responded to the OSC. Appellees Kenneth A. Rushton, Trustee, and Steppes Apartments, Ltd. Filed responses to the Appellant's response. The Appellant, in his Reply in Support of Response to Order to Show Cause on Jurisdiction filed on March 18, 2002, stated that he had filed a motion with the bankruptcy court requesting an extension of time in which to file a notice of appeal ("Rule 8002(c) Motion"). Based on that representation, on March 25, 2002, this Court entered an order staying this appeal pending resolution of the Rule 8002(c) Motion.

On April 19, 2002, the bankruptcy court entered an order denying the Rule 8002(c) Motion ("Rule 8002(c) Order"). The Appellant amended his notice of appeal in the instant appeal to include the Bankruptcy Court's Rule 8002(c) Order.

On May 10, 2002, this Court concluded that the Rule 8002(c) Order could not be appealed through amending the notice of appeal in the instant case. The Court construed the amended notice of appeal as a new notice of appeal and stayed resolution of the instant appeal pending resolution of the new appeal.

On May 22, 2002, this Court entered an order dismissing the new appeal. The time for filing a motion for rehearing of that order has expired, and the Court's mandate has issued in accordance with 10th Cir. BAP L.R. 8016-3.

Fed. R. Bankr. P. 8002(a) requires an

appellant to file a notice of appeal within 10 days of the entry of the order appealed. In this case, the order appealed was entered on January 31, 2002, but the Appellant's Notice of Appeal was not filed until February 12, 2002. Thus, the Appellant's Notice of Appeal is not timely, and, absent an extension of the 10-day period by the Bankruptcy Court pursuant to Fed. R. Bankr. P. 8002(c), this Court lacks jurisdiction over the appeal. *Deyhimy v. Rupp (In re Herwit)*, 970 F.2d 709, 710 (10th Cir. 1992); *Furst v. Furst (In re Furst)*, 206 B.R. 979, 980 (10th Cir. BAP 1997). Because the Bankruptcy Court did not extend the time for filing the Notice of Appeal, this Court lacks jurisdiction over the instant appeal.

Accordingly, it is HEREBY ORDERED that this appeal is DISMISSED.

For the Panel:

Barbara A. Schermerhorn, Clerk of the Court
By: /s/
Deputy Clerk

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH, CENTRAL DIVISION

ENTERED

JANUARY 31, 2002

In re:	Bankruptcy No. 00-26592-JAB Chapter 11
DONALD E. ARMSTRONG, Debtor. SSN; 308-56-3353	Honorable Judith A. Boulden

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DATED JANUARY 31,2002, CONFIRMING AND APPROVING TRUSTEE'S SECOND REVISED PLAN OF REORGANIZATION DATED NOVEMBER 19, 2001 [Docket no. 573] AND GRANTING RELATED MOTIONS [Docket nos. 612, 613, and 695]

The Trustee's Second Revised Plan of Reorganization Dated November 19, 2001 (the "Plan")[1] filed under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, ct seq., was filed by Kenneth A. Rushton, Chapter 11 trustee in this case (the "Trustee"), Following the Court's approval of the Disclosure Statement for the Trustee's Second Revised Plan of Reorganization Dated November 19, 2001 (the "Disclosure Statement") by Order

[1] Capitalized terms in this Order will have the meaning assigned to them in the Plan unless otherwise noted.

entered November 20, 2001, the Disclosure Statement, Plan, notice of hearing and, where appropriate, a ballot, were transmitted to creditors and Donald E. Armstrong, the debtor ("Armstrong" or the "Debtor"). Hearings were held on December 20, and 21, 2001, and on January 4, 11, 14, 15, 17, and 23, 2002 to consider confirmation of the Plan and the following related motions: Motion for Temporary Allowance of Claim filed by Steppes Apartments, Ltd. [docket no. 606] (the "Steppes Temporary Allowance Motion"); Motion for Estimation of Claim Number 1, Claim of Steven R. Bailey, Trustee of Willow Brook Cottages, L.L.C. [docket no. 648] (the "Willow Brook Estimation Motion"); Trustee's Motion dated December 18, 2001, Pursuant to 11 U.S.C. § 1126(e) for Designation of: (1) Donald E. Armstrong as an Entity Whose Rejection of the Plan Was Not in Good Faith; and (2) General Unsecured Creditors Who Reject the Plan as Entities Whose Rejections Were Not Solicited in Good Faith; Trustee's Alternative Motion under Bankruptcy Rule 3018(a) to Change Vote; Trustee's Motion Temporary Allowance of Certain Claims [docket no. 695] (the "Trustee's Voting Issues Motion"); Motion Dated November 30, 2001 Pursuant to Bankruptcy Rule 9019 and Bankruptcy Code Section 1123(b)(3) for Approval of Settlement Among Kenneth A. Rushton, Steppes Apartments, and Roger G. Segal [docket no. 6131 (the "Steppes Settlement Motion"); and Motion Pursuant to Section 521(4) and Section 105(a) for Debtor to Comply with Duty to Surrender Property of the Estate Dated November 30, 2001, Motion for Valuation of Surrendered Property; Motion for Assumption of Executory Contract to the Extent Necessary [docket no. 612] (the "Surrender Motion"). Appearances were made at the hearings as noted on the record.

One objection was timely filed to the Plan by the Debtor, styled as Objections to Proposed Plan of

Reorganization and Settlement Agreement between Steppes Apartments, Ltd., Kenneth A. Rushton, and Roger G. Segal [docket no. 705]. On January 23, 2002, the Debtor untimely filed his Additional Objections to Proposed Plan of Reorganization and Settlement Agreement between Steppes Apartments, Ltd., Kenneth A. Rushton, and Roger G. Segal [docket no. 7851 (together, these two objections will be referred to as the "Debtor's Objection"). The Debtor also tiled his Memorandum in Opposition to Motion for Temporary Allowance of Claim Filed by Steppes Apartments, Ltd. [docket no. 703], his Memorandum in Opposition to Motion for Debtor to Comply with Duty to Surrender Property of the Estate; Motion for Valuation of Surrendered Property, Motion for Assumption of Executory Contract to the Extent Necessary by the Trustee [docket no. 704], and his Objection to Motion for Estimation of Claim No. 1, Claim of Steven R. Bailey, Trustee of Willow Brook Cottages, L.L.C. [docket no. 706] in opposition to related motions.

The Court, by separate Order dated January 17, 2002, temporarily allowed the claims of Steppes Apartments Ltd. (Steppes) ("Steppes Estimation Order") for voting purposes as a Secured Claim in the amount of $120,795 and as an Unsecured Claim in the Amount of $1,398,979 [docket no. 775j. The Court also orally estimated the claim of Steven R. Bailey as trustee in the Willow Brook Cottage's case in the amount of $81,997.24, Execution of that order is pending.

The Court has reviewed and considered the Plan, the Trustee's Motion to Approve Settlement, the Trustee's Voting Issues Motion, and the Surrender Motion (and objections thereto). The Court has also previously ruled on the Steppes Temporary Allowance Motion and the Willow Brook Estimation Motion, and incorporates the same herein. The Court has reviewed and considered memoranda filed in connection with the Plan, the Debtor's

Objection, documentary and oral evidence presented and proffered, the credibility of witnesses, the argument of counsel and the Debtor made at the hearings, and has made an independent review of applicable statutes and case law. Accordingly, the Court finds and concludes pursuant to Bankr. Rule 9014 and Fed. R. Civ. P. 7052, as follows:

A. Jurisdiction. All proceedings noted are core proceedings under 28 U.S.C. § 157. This Court has jurisdiction with respect to these proceedin[9]s under 28 U.S.C. § 1334.

B. Notice. Notice to parties in interest of the time fixed for filing objections and the hearing to consider confirmation of the Plan has been given and is sufficient pursuant to applicable law under, among other provisions, Sections 1126, 1128 and 1129 of the Bankruptcy Code and Fed. R. Bankr. P. 2002, 3017, 3018 and 3019. Notice of the Litigation Injunction was described in specific and conspicuous language **in** both the Disclosure Statement and the Plan, and the parties to which it applies were specified by name and category. The Steppes Settlement Agreement was properly noticed pursuant to Fed. R. Bankr. P. 9019(a). The solicitation package with respect to the Plan (which included the Plan and Disclosure Statement, the Court's Order fixing deadlines and the hearing date on confirmation of the Plan, a notice regarding objection and voting deadlines and hearing on confirmation of the Plan and, where applicable, a ballot) was properly served on all necessary parties [docket no. 5811. The Trustee has satisfied his obligations with respect to service of these documents on parties in interest. Copies of the Willow Brook Estimation Motion, the Trustee's Voting Issues Motion, and the Surrender Motion. and notices of hearing and right to object thereto, were also properly served on all necessary parties.

C. Acceptance. The balloting process on the Plan as conducted by the Trustee has been proper; the Debtor's

interference with the balloting process has been remedied in an appropriate manner; and the Plan has been accepted in writing by the creditors whose acceptance is required by law.

D. Debtor's Objection. The Debtor's Objection has been considered by the Court and is overruled. The Debtor's objections to the Willow Brook Estimation Motion, the Trustee's Voting Issues Motion, and the Surrender Motion have been considered by the Court and are overruled.

E. Plan Conditions to Confirmation. All conditions to Confirmation set forth in the Plan have been satisfied or effectively waived.

F. Section 1129(a)(1). The Plan complies with the applicable provisions of the Bankruptcy Code, including without limitation the provisions of the Bankruptcy Code respecting classification of claims and the requirements of Section 1123 of the Bankruptcy Code.

G. Section 1129(a)(2). The Trustee has complied with the applicable provisions of the Bankruptcy Code.

H. Section 1129(a)(3). The Plan has been proposed in good faith and not by any means forbidden by law.

I. Section 1129(a)(4). All trustee compensation and professional compensation and reimbursement of expenses for services and costs in or in connection with the case and in connection with the Plan and incident to the case has been approved or are subject to the approval of the Court as reasonable.

J. Section 1129(a)(5). The identity, qualifications, and affiliations of the person to be Plan Trustee after confirmation have been disclosed, and the appointment of Kenneth A. Rushton to such position is equitable, consistent with the interests of creditors and the Debtor, and with public policy. The nature of the Plan Trustee's compensation has been fully disclosed.

K. Section 1129(a)(6). The Plan does not propose any changes of rates under the jurisdiction of any regulatory

body and this section is therefore not applicable in this case.

L. Section 1129(a)(7). Each holder of a Claim or equity interest has accepted the Plan or will receive or retain under the Plan property of a value, as of the effective date of the Plan, that is not less than the amount that such holder would receive or retain if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date.

M. Section 1129(a)(8). Exhibit no. 246 sets forth the voting results of ballots returned with respect to the Plan. Class 1 is not impaired. Classes 2A and 2C have voted to accept the Plan because the only creditor in each of those classes voted to accept the Plan, and the Court temporarily allowed or estimated the claim in each of those Classes for voting. With respect to Class 4, the Court ruled orally on the Trustee's Voting Rights Motion[2] that the Claims of Enis & Gilchrist, Linda Jenkins, and Robert Smith (collectively, the "Disputed Class 4 Claims") were held 70% by the Trustee and 30% by the Debtor pursuant to the Court's Order (docket no. 3531 which approved a transfer to the Debtor of rights against creditors holding those Claims with the proviso that the Estate would receive 70% of any collection or recovery against the holders of such claims. The Debtor purported to vote the full amount of each of the Disputed Class 4 Claims as rejecting claims in Class 4. Following the Court's ruling, the Trustee voted whatever portions of the Disputed Class 4 Claims he holds in favor of the Plan. In voting the Disputed Class 4 Claims, the Trustee asserted the right as the majority owner of those claims to vote the full amount of each claim as an accepting claim in Class 4. Whether the Trustee votes the full amount of the Disputed Class 4 Claims or 70% of them, or whether each of these claims is treated as two claims for voting purposes to be voted by the Trustee and the Debtor, Class 4 has voted to accept the Plan because creditors who hold at least two-thirds in amount and more

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[2] The Court's ruling on the Trustee's Voting Rights Motion is reduced to writing in this Order.

than one-half in number of the allowed claims of such class held by such creditors have voted to accept the Plan.[3] 11 U.S.C. § 1 126(c). Under the reasoning *of* ***In re RUTI-Sweetwater, Inc.,*** 836 F.2d 1263, 1267 (10th Cit. 1988), Classes 2B, 2D, 2E, and 3A are deemed to have accepted the Plan because no one in those secured classes voted on the Plan or objected to the Plan. There are no creditors in Class 2F or 3B.

N. Section 1129(a)(9). Except to the extent that a holder of a particular claim has agreed to a different treatment of such claim, the Plan satisfies the requirements of Section 1129(a)(9) with respect to the payment of claims having priority under Section 507 of the Bankruptcy Code.

O. Section 1129(a)(10). Classes 2A, 2C, and 4 are impaired classes that have voted to accept the Plan, determined without including any acceptance of the Plan by any insider.

P. Section 1129(0(11). Confirmation of the Plan is not likely to be followed by the further liquidation or the need for further financial reorganization of the Debtor except as provided in the Plan.

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[3] If the Trustee is permitted to vote the full amount of the Disputed Class 4 Claims, then 8 Claims voting in that Class voted to accept the Plan and 4 voted to reject, with claims totaling $1,604,25.22 voting to accept and $89,774.87 voting to reject the Plan. If the Trustee is permitted to vote 70% of each Disputed Class 4 Claim and the Debtor 30% (with the Disputed Class 4 Claims being split fur purposes both of number of claims voting and for amounts voted, then the voting in Class 4 is 7.1 votes to accept the Plan and 4.9 votes to reject the Plan, with claim amounts totalling $1,569,024.76 in favor of the Plan and $125,009.33 against the Plan. If each of the Disputed Class 4 Claims is split so that each would be counted as two votes in Class 4, but the Trustee would vote 70% of each Disputed Class 4 Claim and the Debtor 30% of each Disputed Class 4 Claim, the result would be 8 votes to accept rhe Plan, 4 votes ro reject the Plan, with claims totaling $1,569,024.76 in favor of the Plan and $125,009.33 against the Plan. In each of these three alternative scenarios, the requirements of Section 1126(d) for acceptance of the Plan are met with respect to Class 4.

Q. Section 1129(a)(12). All *fees* under 28 U.S.C. § 1930, as determined by the Court at the hearing on confirmation of the Plan, have been or will be paid on the effective date of the Plan.

R. Section 1129(a)(13). Section 1129(a)(14) is inapplicable in this case.

S. Section 1129(b).

(1) Class 5. The requirements of Section 1129(b) of the Bankruptcy Code have been met with **respect** to Class 5 under the Plan because the Plan does not discriminate unfairly, and is fair and equitable with respect to Class 5, in that the Plan provides that no holder of an interest in a class junior to Class 5 will receive or retain under the Plan on account of such junior interest any property. *There is no* class of interests junior to Class 5.

(2) Alternative Cramdown Findings with Respect to Classes 213, 2D, 2E, and 3A. The Court has found and concluded that Classes 213, 2D, 2E, and 3A are deemed to have accepted the Plan pursuant to *In re RUTI-,Sweetwater,* 836 F.2d 1263 (10th Cir. 1988). Alternatively, the requirements of Section 1129(b) of the Bankruptcy Code have been met with respect to Classes 2B, 2D, 2E, and 3A under the Plan because the **Plan** does not discriminate unfairly, and is fair and equitable, with respect to these Classes, in that the Plan provides for the sale or abandonment of the property securing such claims with the holder of such claim receiving thereby either the property securing such claims or the proceeds of such sale to the extent of the allowed amount of such claim.

(3) Alternative Cramdown Findings with Res[p]ect to Class 4. Based on rulings of the Court related to votes in Class 4, the Court has found that Class 4 is an accepting class of claims. Alternatively, the requirements of Section 1129(b) of the Bankruptcy Code have been met with respect to Class 4 under the Plan because the Plan does not discriminate unfairly, and is fair and equitable,

with respect to Class 4, in that the Plan provides that no holder of a class of claims junior to Class 4 (there are none) or that a class of interests will receive or retain under the Plan on account of such interest any property. If it is determined on appeal that Class 4 is not an accepting class, interest on Allowed Unsecured Claims will accrue from the effective date of the Plan at the legal rate under 28 U.S.C. § 1961 and will be paid prior to any distribution to the holder of the Class 5 interest.

T. Trustee's Voting Rights Motion. The Court previously made findings of fact and conclusions of law on the Trustee's Voting Issues Motion on the record on January 15, 2002. In addition to those rulings which are incorporated herein, the Court determines that by his actions in sending letters to all or virtually all of the creditors of this estate making false and misleading statements regarding the case and the legal effect of actions taken therein, the Debtor has tainted the voting on the Plan. It is impossible to know how many creditors did not vote on the Plan because of the Debtor's actions or how his actions may have impacted those who did vote. The Debtor's actions in distributing two letters to virtually all creditors in this case was done in bad faith. The letters distributed by the Debtor were replete with statements of law and fact that the Debtor knew to be misstatements and knew to be inaccurate, and the letters misrepresented the circumstances of the Plan. Further, the Debtor knew he was prohibited from distributing those misstatements to creditors, and knew some of the issues in his letters had been discussed by the Court at length at the disclosure statement hearing. Nonetheless, the Debtor knowingly and intentionally circulated the misinformation in an attempt to improperly influence creditors' votes.

In spite of the Debtor's bad faith effort to improperly influence voting, ballots cast in all classes voting on the Plan voted to accept the Plan except for Classes 4 and 5. The Debtor purported to vote the

Disputed Class 4 Claims in spite of the fact that the 70% majority ownership interest in such claims is held by the Estate. The Trustee had not and has not abandoned the Estate's interest in the Disputed Class 4 Claims pursuant to the Disclosure Statement or any order approving the Disclosure Statement. Such rights to the Disputed Class 4 Claims are vested rights and are not residual rights. The Trustee's rights to assert ownership by the Estate over the Disputed Class 4 Claims arose and vested prior to the Confirmation Date of this Plan and, thus, any abandonment provision under the Plan does not affect the Trustee's rights to the Disputed Class 4 Claims including the provision 7.3 of the Plan. Rather, the Trustee *has* asserted the Estate's ownership of *70%* of the Disputed Class 4 Claims, which ownership interest has vested and been recognized by this Court, and the Trustee *has* been allowed by this Court to vote the Estate's ownership interest in the Disputed Class 4 Claims, The Trustee does not abandon, pursuant to the Plan, the Estate's ownership interest in the Disputed Class 4 Claims. With respect to any residual rights or claims (not including in any way the Disputed Class 4 Claims) of the Estate and Trustee under the Order Approving Trustee's Motion for Sale [exhibit no. 212) and as to which no settlement or disposition vested rights in the Trustee prior to the Confirmation Date, such residual rights are abandoned pursuant to Section 7.3 of the Plan.

U. Steppes Settlement Motion. The parties entered into a settlement agreement among Kenneth A. Rushton, Steppes Apartments, and Roger G. Segal as trustee of the estate of Mountain Pacific Ventures, Inc. (MPV) (the "Steppes Settlement Agreement"). The Steppes Settlement Agreement resolves Steppes' claims against this Estate premised upon its theories of fraudulent transfer, conspiracy, alter ego, constructive trust, unjust enrichment, and declaratory judgment based upon the Amended Complaint in the case of Steppes Apartments, Ltd. v. Donald E. Armstrong, et al.;

claims for malicious prosecution, abuse of process, and/or wrongful use of civil proceedings, as set forth in Steppes Nondischargeability Complaint against the debtor; and claims based upon this Estate as the successor-in-interest to the Donald E. Armstrong Family Trust and/or the Donald E. Armstrong Charitable Remainder Unitrust, (the Armstrong Family Trust and Charitable Remainder Unitrust are collectively referred to as the "Trusts"). and/or *to* the extent that the assets and liabilities of the Family Trust and/or Unitrust are part of this estate. The Steppes Settlement Agreement also resolves this Estate's claims against the MPV Estate based upon asserted fraudulent transfers, and the defense asserted by the MPV estate that the *lis pendens* filed by Steppes against property of MPV consistutes a wrongful lien. In considering whether to approve the settlement, this Court must make an informed decision based upon an objective evaluation of developed facts. *Reiss v. Hagmann, 881* F.2d 890, 891-92 (10th Cir. 1989)(recognizing the considerations set forth in *American Employers' Insurance Co.,* and applying them to a Chapter 7 context). While the Tenth Circuit has not articulated specific factors for consideration, in *Reiss v. Hagmann,* 881 F.2d at 891-92, the court recognized those factors set forth in *Protective Committee Stockholders v. Anderson, 390* U.S. 414, *424-25 (1968),* and *American Employers' Insurance Co. v. King Resources Co.,* 556 F.2d 471, 475 (10th Cir, 1977). Based thereon, the Court concludes that the Steppes Settlement Agreement was entered into in good faith, the Steppes Settlement Agreement is fair and equitable and in the best interests of creditors, and the Trustee has properly exercised his business judgment as follows;

(1) Probability of Success on the Merits. As this Court found in the Steppes Estimation Order, it is likely that the Debtor and the Estate are liable to Steppes and that Steppes holds significant secured and unsecured claims against the Debtor and the Estate based on theories as

set forth above and as described in the Steppes Estimation Order, It also appears that Steppes has suffered significant damages that could be proven at trial. It is unlikely that the Trustee would prevail against Steppes and the Steppes Parties in litigation to any meaningful degree on affirmative claims for damages on account of a *lis pendens* filed by Steppes, for wrongful use of civil proceedings, abuse of process, for conspiracy, or any other cause of action or theory asserted by the Debtor. The Estate faces numerous legal and evidentiary challenges in establishing any claim against Steppes. Furthermore, the testimony of the Debtor respecting his or the Estates claims against Steppes and in support of his defenses against *the* claims *is not* credible, and the defenses raised by Armstrong to those claims are not supported by persuasiveevidence and are inconsistent with prevailing law. The Debtor has asserted *these* claims and defenses in the past in various courts and has not prevailed. Judge *Sam* granted *partial summary* judgment in favor of Steppes with respect to a counterclaim and defenses asserted in Civil No. 2:97-CV-663ST in the United States District Court. for the District of Utah [exhibit no. 86J. Judge Stewart ordered that the Debtor's *answer he stricken in* the same action and ruled in favor of Steppes on all claims [exhibit no. 5). That ruling was never reduced to a written *order only* because the Debtor filed Chapter 11 shortly *after the* ruling. The judgments against the Trusts controlled by the Debtor prepetition have been affirmed on appeal by an intermediate Texas State court of appeals and the Texas Supreme Court has denied petitions for review filed by the Debtor and others [exhibit no.1O2]. The Debtor's attempts to collaterally attack these Texas judgments have been made in had faith and in violation of various legal principles. Therefore, the Trustee's assessment of the probability of success on the merits of litigation strongly supports approval of the Steppes Settlement.

(2) Difficulties to Be Encountered in

Collection of a Judgment. There is no evidence that has been presented that the Trustee would or would not be able to collect a judgment against Steppes if he were to be successful in litigation against Steppes. Thus, this factor does not weigh in favor or against approval of the Steppes Settlement.

(3) Complexity, Expense. Inconvenience, and Delay in Pursuing Claims. The claims and defenses asserted by the Debtor against Steppes have resulted in significant expense, inconvenience, and delay to Steppes and to the Estate. Although these claims asserted by the Debtor are convoluted, redundant and based upon the Debtors shifting factual interpretations, they do not appear to be unusually complex. However, the only alternative to the Settlement Agreement is continued litigation between the parties, including the Estate, the Debtor and Steppes, and the Court concludes that continued litigation would exhaust any funds in the Estate before it could he resolved and would consequently eliminate any return to creditors. If the Settlement is not approved, the Court concludes that continued litigation is inescapable, given the parties past history, pending actions, Armstrong's stated purpose to continue this litigation at all costs, and Steppes apparent resource to fund litigation. Even were one of the parties to succeed at a trial court level, the other would surely appeal until there is no further appeal available. Armstrong, would then, as in the past, attempt to collaterally attack any judgment and refuse to acknowledge any loss or the finality of any judgment. Therefore, if the Steppes Settlement Agreement is not approved, the litigation would continue indefinitely at great expense. This factor supports approval of the Steppes Settlement Agreement, particularly in light of the significant likelihood that the Estate would not he successful in claims asserted against Steppes or in defeating claims asserted by Steppes.

(4) Interests of Creditors, with Deference

to Their Reasonable Views. Few creditors have participated actively in this case. The majority of creditors voting on the Plan voted to accept the Plan. Only one creditor whose vote was not exercised by the Debtor as part of a settlement with the Debtor voted to reject the Plan. [Ballot Summary attached to exhibit no. 246.] The Steppes Settlement Agreement is in the best interest of all parties inasmuch as it resolves over seven years of litigation and secures for each creditor a reasonable and definable recovery from this estate. Were the litigation to continue, it would consume any moneys the estate may hold and there would likely be no distribution to unsecured creditors or equity interest holders. If the case were converted to chapter 7 because the Steppes Settlement Agreement was not approved, there would also likely be no distribution to creditors. because continued costs of litigation would consume the Estate until it was closed, with no return other than to administrative claimants, if even they could be satisfied. Under the Steppes Settlement Agreement, the creditors may receive the benefit of full payment of their claims and the Estate will be released of all potential or contingent liability to Steppes and MPV. This Estate will also receive the benefit of a substantial reduction in the amount of Steppes' claim that could be allowed, a result which may not occur if the various adversary proceedings continued. The probability is high that if the issues were fully litigated, a judgment may enter in excess of the Steppes stipulated claims. The Trustee, in entering into the Steppes Settlement Agreement, properly considered the potential outcome of the Texas Litigation (as defined below) and the defenses and claims asserted by the Debtor to Steppes' claims. The Trustee insisted on and obtained, in the Steppes Settlement Agreement, a result that contemplated the possibility of a judgment against Steppes in the Texas Litigation. The Steppes Settlement Agreement is proposed and supported by competent and experienced attorneys, including two Chapter 11 Trustees, their

respective counsel, as well as counsel for Steppes. The Steppes Settlement Agreement has also been approved in the MPV bankruptcy case. The Steppes Settlement Amount is within the range of potential outcome of such litigation, defenses and claims if they were actually litigated. *See Kopp v. All American Life Ins. Co.* ***(In re Kopex Realty Venture Co.),*** 213 B.R. 1020, 122 (10th Cie. BAP 1997)(recognizing a trustee's authority to enter into settlement agreements and setting forth four elements by which a court can make an informed decision concerning the propriety of a settlement agreement).

(5) Litigation Injunction. The Steppes Settlement Agreement, and the Plan, provide for a Litigation Injunction, more fully described as a permanent injunction enjoining Armstrong, the Trusts, and all other Armstrong Entities from commencing or continuing litigation against the Steppes Parties (as defined in the Steppes Settlement Agreement), Roger Segal, the Trustee, and any of those parties' principals, professionals, agents, and assigns, based upon specific causes of actions set forth therein. The Litigation Injunction further provides, among other things, that Armstrong must apply to this Court for authority to commence or continue any litigation against these parties. Upon independent review of case law, the applicable pleadings, and based on the extensive evidentiary hearings on these matters, as well as considering those actions taken during the pendency of this case, this Court's assessment of the Litigation Injunction is as follows:

The Steppes Settlement Agreement is an essential element supporting resolution of the matters between this Estate and its creditors and requires that the Trustee seek the Litigation Injunction through the confirmed Plan. Failure to approve the Litigation Injunction would undoubtedly have four results: First, it would encourage the filing of a multiplicity of actions by and between

Armstrong, Steppes, MPV, and this Estate; second, the ensuing litigation would be costly to this Estate in that this is a liquidation plan and, therefore, the estate holds limited assets that will only be depleted by further litigation; third, it would likely lead to a disorderly and inequitable distribution of assets to creditors, contrary to the contemplation of the Bankruptcy Code, the plan, and the Steppes Settlement Agreement; and fourth, it would result in substantial disruption of the Steppes Settlement Agreement which, in part, releases this Estate's liability to Steppes. Therefore, absent the Litigation Injunction, this Estate would suffer imminent and irreparable harm.

The Litigation Injunction is required for successful consummation of the Plan and payment of creditors in order to restrain further litigation and depletion of assets of the estate. Undoubtedly, the Plan rests on the Trustee's ability to focus his efforts on liquidation, not litigation. Steppes, the Estate and MPV have all made contributions to the Plan by approving the Steppes Settlement Agreement, and Steppes has made an important contribution to reorganization in compromising its claim, and the Plan provides for payment of substantially all of the claims affected by the release.

If the injunction is not granted, the Trustee will he subject to continued litigation and his ability to implement the terms of the confirmed plan will be significantly and adversely affected, which in turn adversely affects this Estate and, ultimately, all parties in interest. By comparison, the Litigation Injunction will have relatively few adverse effects inasmuch as Armstrong is the only party (other than the vote of English & Gloven) objecting to its issuance. The harm to Armstrong will he that he will be unable to satisfy his bent for uncontrolled litigation. However, that consideration has no merit in this context. Should any issue arise regarding the scope of the Litigation Injunction, Armstrong must apply to this Court

for authority to commence or continue any litigation against these parties. Therefore, his lights are protected.

The issuance of the Litigation injunction advances the public interest. By protecting the value of the Estate through the efficient and focused liquidation of its assets, the Litigation injunction will conserve the liquidated assets for the benefit of creditors as well as, potentially, Armstrong. To squander those assets in tireless litigation only serves to deplete the money available to creditors and Armstrong. In addition, the public interest is best served by preventing the inefficient use of judicial resources in the adjudication of whatever matters the enjoined parties may conceive. Voluminous pleadings and countless, unfruitful hearings only serve to clutter a court's docket and to deprive other parties of a court's attention. Moreover, the Litigation Injunction is in Armstrong's best interest. As a Class 5 creditor, he will receive any remaining residual benefit from the efficient liquidation of Estate assets rather than forcing the Trustee to divert those assets toward paying legal fees incurred in litigating matters. Further, the litigation injunction allows Armstrong to pursue his "fresh start" as contemplated by the Bunkruptcy Code.

Finally, it is without question that this court has the authority to enjoin actions which threaten the integrity of the Estate. *In re Energy Go-op,* 886 F.2d 921 (7t^{h} Cit. 1989). Absent the injunction, the parties sought to be enjoined will continue the practice of bringing and defending against unyielding litigation. Armstrong has made unequivocal his intentions to collaterally attack the Texas Modified Judgment and any ruling of this or any other court that he feels affects him adversely. Similarly, Steppes has demonstrated that as long as Armstrong files various causes of action, it will defend against those actions whatever the cost. As a result, this Estate will undoubtedly have to participate in order to defend its interest against these recurring abuses and will, along with

the other parties, incur substantial expense in litigating those matters. In addition, this Court's Case Management Order dated November 7, 2000 orders all parties in this bankruptcy case not to interfere with the administration of the estate or its assets and to seek a Court ruling if they are unclear on what those boundaries are. Nevertheless, Armstrong has repeatedly violated that Case Management Order by filing duplicative complaints in various jurisdictions, attempting to assert control over interests of this Estate, and interfering with the administration of the estate. Nothing short of the Litigation Injunction will protect the estate. There is a cognizable danger of recurrent violations, and no representation that Armstrong may make that he will not continue to interfere with the administration of the Estate is reliable.

V. Surrender Motion. In connection with Surrender Motion, the Debtor has at all relevant times been the trustee of the Charitable Remainder Unitrust (organizational documents and amendments included as exhibit no. 213) and the Armstrong Family Trust (organizational documents and amendments included as exhibit no. 214). The rights of the Debtor as settler and income beneficiary under the Armstrong Family Trust became property of this Estate. The rights of the Debtor as donor and recipient under the Charitable Remainder Unitrust also became property of this Estate. Also, two judgments (exhibits no. 203 and 204 at the confirmation hearing, hereinafter the "State Court Judgments") transferred the rights to all of the property of the Charitable Remainder Unitrust and the Armstrong Family Trust to the Debtor prior to the Debtor's bankruptcy filing. Thus, all of the property of the Trusts became property of this Estate. The property included, but is not limited to, any and all rights to pursue, prosecute, settle or otherwise exercise control or dominion over the so-called "Texas Litigation," litigation beginning in Tarrant County Texas, *Case* No. *67-156473-94* and subsequently appealed

and determined by an order entered by the Texas Court of Appeals [exhibit no. 1]. All petitions for of review to the Texas Supreme Court with respect to the Texas Litigation have been denied. The guarantee of John L. Feece [exhibit no. CC] and all rights thereunder *in favor of the* Trusts also became property of Debtor's Estate pursuant to the State Court Judgments. The evidence has also proven that all of the following causes of action are property of the Estate and have been wrongfully and contemptuously maintained by the Debtor and/or the Trusts: (1) litigation initiated by complaint [exhibit no. 50J and pending in Utah State District Court, Case No. 010600131; (2) litigation initiated by complaint [exhibit no. 53] and pending in United States District Court, Northern Division of Texas, Dallas Division, Case No. 3-01CV1722-L; (3) litigation initiated by complaint [exhibit no. 55] and pending in United States Bankruptcy Court, District of Utah, Adv. Proc. No. 01-2226; (4) litigation initiated by complaint [exhibit no.57] and pending in the United States District Court, District of Utah, Civ. Case No. 01-CV-843. It is therefore determined that the Trustee has the authority to control the litigation described herein and similar litigation not described herein which has been or may be initiated by the Debtor.

The Debtor, as trustee of the Trusts, stipulated and caused such State Court Judgments to be entered in favor of himself. The State Court Judgments are final, valid, nonappealable orders of the Utah State Court and are binding upon the Debtor and the Trusts. The State Court Judgments do not constitute "contracts" of any type between the Debtor and the Trusts. The Debtor as trustee of the Trusts is responsible for complying with the State Court Judgments and any court of competent jurisdiction, including this Court, may order the Debtor to comply with the State Court Judgments. The Debtor also effected the dissolution of the Armstrong Family Trust prior to this filing as evidenced by amendment 13 in exhibit no, 214.

It having been determined, after hearing on notice, that the Plan satisfies the requirements for confirmation set forth in 11 U.S.C. § 1129(a) and (b), and that good cause appears to grant the related motions as set forth below, and based on findings of fact and conclusions of law announced on the record and the foregoing findings of fact and conclusions of law, IT TS ORDERED that:

1. Confirmation of the Plan. The Plan is confirmed. A copy of the confirmed Plan is attached to this order as exhibit no. A[4].

2. Voting Rights. The Trustee's Voting Rights Motion is granted. The Trustee owns and was authorized to vote 70% of each of the claims of Enis & Gilchrist, Linda Jenkins, and Robert Smith and the Debtor was authorized to vote 30% of such claims.

3. Steppes Settlement. The Steppes Settlement Agreement is approved and the Steppes Settlement Motion is granted.

4. Surrender of Assets. The Surrender Motion is granted. The Debtor is ordered to surrender to the Trustee and to cease exercising dominion or control over any of the following:

a. All causes of action, claims, assets, and personal property that is not exempt in the possession of and belonging to Donald E. Armstrong as of March 10, 2000, the date of filing. Such interests include the rights as settlor and beneficiary under the Armstrong Family Trust and the rights as recipient and donor under the Charitable Remainder Unitrust.

b. All causes of action, claims, assets, and personal property in the possession of and belonging to the Trusts as of November 26, 1999, and thereafter,

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[4] It appears that some of the pages of the docketed Plan are duplicates.

including any rights that the Trusts may have had in the litigation referred to as the Texas Litigation, originally filed in Tarrant County, Texas. Case No. 67-156473-94, and any lights to appeal therefrom, including all petitions, writs and motions which may be brought in any court including the United States Supreme Court.

c. Donald E. Armstrong, as trustee of the Trusts and as Debtor in this case, is ordered to surrender any rights he or the Trusts purports to assert to the Texas Litigation (and all causes of action asserted therein) and all other litigation involving the Trusts or derived from rights belonging to the Trusts, including the following cases, claims and causes of action: (1) litigation initiated by complaint [exhibit no. 50] and pending in Utah State District Court, Case No. 010600131; (2) litigation initiated by complaint [exhibit no. 53] and pending in United States District Court, Northern Division of Texas, Dallas Division, Case No. 3-01CV1722-L; (3) litigation initiated by complaint [exhibit no. 55] and pending in United States Bankruptcy Court, District of Utah, Adv. Proc. No. 01-2226; (4) litigation initiated by complaint [exhibit no.57] and pending in United States District Court, District of Utah, Civ. Case No. 01-CV-843. The Debtor is ordered and required to surrender the foregoing causes of action, suits, doses in action and claims by obtaining the dismissal of each of the specific causes of action set forth above. With respect to any other cause of action maintained by the Trusts or otherwise belonging to the

Estate, the Debtor is instructed to seek direction from the Trustee with respect to the surrender of such cause of action. To the extent the Debtor fails, within 15 days after the entry of this Order, to effectuate the dismissal of the litigation identified in this paragraph, the Trustee shall have the right to effectuate the dismissal of such litigation by presenting this Order in the case on behalf of the Debtor and effecting a dismissal with prejudice.

d. Donald E. Armstrong, as trustee of the Trusts and as Debtor in this case, is ordered to surrender all assets of the Trusts, including (1) the guarantee of John L. Fee= [exhibit no. CC J executed in favor of the Trusts dated September 29, 1994; (2) the notes and trust deeds executed by Steppes in favor of the Trusts including the Note dated September 29, 1994, in the original principal amount of $375,250, and recorded on September 29, 1994 as Instrument No. D194217212 executed by Steppes and the Armstrong Family Trust and the Trust Deed associated therewith recorded as Instrument No. D194217212, the note dated September 29, 1994 in the original principal amount of $1,071,500 executed by Steppes, together with the Trust Deed associated therewith and recorded as Instrument D194217210, and other associated documents including the "Assignment of Rents and Leases and UCC-1 Fixture Filing" which were closing documents issued from Escrow No. GF#AH-94CO7667-RCS associated with the aforementioned notes and trust deeds; (3) all other personal property of the Trusts. These items of property shall be considered immediately surrendered by the Debtor and transferred to the Estate, to the extent necessary, by virtue of the execution of this order without the need of any further documentation. This order shall be proof of the Trustee's ownership of such property and the Trustee may use this document to establish the Estate's interest in such property.

e. The Estate's interest as settlor shall

be exercised by the Trustee to the extent necessary to complete the revocation and dissolution of the Armstrong Family Trust. Armstrong shall have no right to participate in the dissolution of the Armstrong Family Trust or to assert any interest associated with the Armstrong Family Trust,

f. The Debtor, as Trustee of the Charitable Remainder Unitrust, is ordered to comply with the State Court Judgments and surrender any and all property, claims, assets, and causes of action to this Estate until such time as he is removed as Trustee of the Charitable Remainder Unitrust by this Estate acting as Donor of the Charitable Remainder Unitrust.

g. *The* litigation rights belonging to this Estate derived from the Trusts which afford this Estate rights against Steppes, including the Texas Litigation, are valued for the purpose of this ruling only at $1,398,979 and shall be deemed to satisfy the State Court Judgments In that amount.

5. Objections Overruled. The Debtor's Objection and all other objections, if any, to the Plan, and all objections to the Trustee's Voting Rights Motion, the Steppes Settlement Motion, and the Surrender Motion are overruled.

6. Implementation *of* the Plan. The Trustee is hereby authorized to take all steps and execute any and all documents necessary or appropriate to implement the Plan, the Steppes Settlement, and the Debtor's surrender of assets.

7. Discharge of the Debtor. Except as otherwise provided in the Plan and in the Bankruptcy Code, effective on the Effective Date, to the extent permissible under Section 1141 of the Bankruptcy Code, the Debtor is discharged of all prepetition debts of, claims against, liens on, and interests in the Debtor, his assets, or properties, which debts, claims, liens, and interests arose at any time before the entry of the filing of this Case.

Because the Debtor is an individual debtor, confirmation of the Plan does not discharge him from any debt excepted from discharge under Section 523 of the Bankruptcy Code.

8. Releases.

A. Steppes Release. The release by the Trustee and the Estate of any and all claims arising from events that occurred before Confirmation, including claims of any nature whatsoever that the Trustee or the Estate hold for monetary damages or otherwise, whether known or unknown, liquidated or unliquidated, against Steppes (as defined in the Plan), the Steppes Parties (as defined in the Plan), and Steppes employees, principals, professionals, agents, successors-in-interest, and assigns, is approved.

B. Release of the Estate. Except as otherwise expressly provided in the Plan, on the Effective Date, all Persons who have held, hold, or may hold claims, in consideration for the obligations of the Estate under the Plan, will be deemed to have forever waived, released, and discharged all rights or claims, whether based upon tort, fraud, contract, or otherwise, which they heretofore, now, or hereafter possess or may possess against the Estate existing prior to the Effective Date, except as set forth in the Plan.

9. Injunctions.

A. Section 1141 Injunction . In accordance with Section 524 of the Bankruptcy Code, the discharge provided by this section and Section 1141 of the Bankruptcy Code, *inter alia,* shall act as an injunction against the commencement or continuation of any action, employment of process, or act to collect, offset, or recover the claims discharged hereby.

B. Litigation Injunction, Donald E. Armstrong, the Donald E. Armstrong Family Trust, the Donald E. Armstrong Charitable Remainder Unitrust, and any other entity related to the Debtor and controlled by him in whole or in part, now and in the future, and any other

entity over which the Debtor asserts actual control in whole or in part, now and in the future, their agents, attorneys and those acting in concert with them, are hereby permanently enjoined from commencing or continuing any litigation against Steppes Apartments, Ltd., John Feece, Rosalie Feece, Baxter Holdings, Inc., Jeffrey L. Shields, Zachary T. Shields, Callister Nebeker & McCullough, Robert Bodoin, Hill Gilstrap, Frank Hill, Frank Gilstrap, Sal Espino, Chris Harris, Ben Levinson, Victor Vilaplana, Dennis Wickham, Elizabeth Smith, and Seltzer Caplin McMahon Vitek, and any and all other attorneys of Steppes and their law firms and all employees of such firms, Roger G. Segal as trustee in *In re Mountain Pacific Ventures, Inc.,* Bankr. Case No. 99-22588, Kenneth A. Rushton, the Trustee in this case, and these parties' principals, professionals. agents, and assigns based upon (1) claims or causes of action released pursuant to the terms of this Plan and the Steppes Settlement Agreement, and (2) claims or causes of action based upon action taken by the Trustee, Segal, the Steppes Parties (all as defined in the Plan) and any of those parties' principals, professionals, agents, and assigns in effectuating the Steppes Settlement Agreement and this Plan. *See also* Fed. R. Bankr. P. 3016(c)(2002).

Armstrong must apply to the Court for authority to commence litigation against any of these parties or their principals, professionals, agents, or assigns, must show that the proposed litigation does not violate the terms of this Plan, and must provide reasonable notice and opportunity to respond to the party against whom Armstrong wishes to proceed. The Court will grant such authority only upon a finding that such litigation does not violate the terms of this Plan, including the Litigation Injunction and the Releases described in Sections 12.1.1.1 and 12.1 .1.2 of the Plan. If Armstrong applies to the Court to pursue such litigation and his application is denied, then the party or parties responding to the application shall be

awarded reimbursement of attorneys' fees and costs reasonably incurred in connection with the application, with such reimbursement to be paid from the Reorganization Trust.

10. Retention of Jurisdiction. The Court shall retain exclusive jurisdiction of this case for the purposes set forth in the Plan, including without limitation, to adjudicate all controversies concerning the classification or allowance of claims, to make such Orders as are necessary or appropriate to aid the consummation of the Plan and to ensure the implementation of the provisions of the Plan and this Order in the manner provided under Section 1142 of the Code and Fed. R. Bankr. P. 3020(d).

11. Plan and Order Binding. The provisions of the Plan and this Order are hereby made binding upon the Trustee, the Debtor, and any and all holders of claims against or interest in the Debtor, whether or not such claim or interest is impaired under the Plan, and whether or not such holder of a claim has accepted or rejected the Plan.

12. No Release of Regulatory Obligations. Nothing in this Confirmation Order or the Plan releases any entity from any liability to the United States or the State of Utah under any police or regulatory statute enforceable by the United States or the State of Utah, as the owner or operator of property after the Effective Date, nor shall anything in the Confirmation Order or Plan discharge any claim of the United States or the State of Utah under environmental statutes that arises after confirmation of the Plan.

13. Trustee to Give Notice of Entry of Confirmation Order. The Trustee shall give to all creditors and parties in interest notice by mail of the entry of this Order in accordance with Fed. R. Bankr. P. 2002(0(7) and shall file a certificate evidencing such service.

Dated: January 31, 2002

By the Court:

/s/
Honorable Judith A. Boulden
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DATED JANUARY 31, 2002. CONFIRMING AND APPROVING TRUSTEE'S SECOND REVISED PLAN OF REORGANIZATION DATED NOVEMBER 19, 2001 [Docket No. 573] AND GRANTING RELATED MOTIONS [Docket Nos. 612, 613, and 695]** upon the following at the address set forth below, postage prepaid, by depositing the same in the United States Mail on the 31st day of January, 2002.

Jeffrey L. Shields, Esq. and Zachary T. Shields, Esq
Callister Nebeker & McCullough
Gateway Tower East Suite 900
10 East South Temple
Salt Lake City, UT 84133
Attorneys for Steppes Apartments, Ltd.

Kenneth L Cannon IT, Esq. and Penrod W. Keith, Esq.
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
136 South Main Street, Suite 1000
Salt Lake City, UT 84101
Attorneys for Kenneth A. Rushton, Chapter 11 Trustee.

Duane H. Gillman, Esq.
McDowell & Gillman
Twelfth Floor
50 West Broadway
Salt Lake City, Utah 84101
Attorneys for Steven R. Bailey, Trustee of the estate of Willow Brook Cottages, L.L.C.

Peter Kuhn, Esq.
U.S. Trustee's Office
9 Exchange Place, Suite 100 Salt Lake City, UT 84111
Law Clerk

Donald Erwin Armstrong
P. O. Box 1059
Park City, UT 84060

/s/
Law Clerk

APPENDIX D
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals Tenth Circuit
MAY 27 2004
PATRICK FISHER
Clerk

In re: DONALD E. ARMSTRONG, Debtor.	
DONALD E. ARMSTRONG, Appellant, v. KENNETH A. RUSHTON, Trustee; STEPPES APARTMENTS, LTD.; STEVEN R. BAILEY, Trustee; UNITED STATES TRUSTEE, Appellees.	No. 02-4106 (BAP No. UT-02-038) (BAP)

ORDER AND JUDGMENT*

Before McCONNELL, ANDERSON, and BALDOCK, Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Donald E. Armstrong, a debtor-out-of-possession in his Chapter 11 bankruptcy, appeals the order of the Bankruptcy Appellate Panel (BAP) denying his election to have his appeal heard in the district court and dismissing his appeal for failure to pay the filing and docketing fees. We affirm.

On January 31, 2002, the bankruptcy court confirmed the reorganization plan in Armstrong's Chapter 11 proceeding. Armstrong filed an untimely notice of appeal in the bankruptcy court (BAP case No. 02-011), causing the BAP to issue a show-cause order why the appeal should not be dismissed for lack of jurisdiction. In an attempt to remedy the late filing, Armstrong filed a motion in the bankruptcy court for an extension of time in which to file the notice of appeal. Citing Bankruptcy Rule 8002(e)(1)(F) which expressly prohibits a bankruptcy judge from extending the time for filing a notice of appeal when the order appealed from confirms a plan under 11 U.S.C. § 1129, the bankruptcy court denied Armstrong an extension. We will refer to this order as the 8002(c) denial order. Without paying any additional filing fees, Armstrong then filed what he termed an "amended" notice of appeal in BAP 02-011 in which he sought to add to that pending appeal an appeal of the 8002(c) denial order as well as an appeal from a third matter relating to a claims order entered by the bankruptcy court. Armstrong did not, at the time he filed the "amended" notice of appeal, elect to have the matters heard by the district court. *See* Fed. R. Bankr. P. 8001(e); 28 U.S.C. § 158(c)(1). The BAP construed this "amended" notice of appeal to be two new notices of

appeal and assigned them new appeal numbers: 02-038 for the appeal of the 8002(c) denial order, and 02-039 for the appeal of the claims order. By order dated May 10, 2002, the BAP informed Armstrong of its construction of his "amended" notice of appeal and ordered him to pay the filing and docketing fees within ten days.

Instead of paying the fees, Armstrong filed an election to have appeal No. 02-038 heard in the district court. The BAP docket entry in 02-038 noted that the election was untimely. On May 22, when Armstrong had not paid the fees as ordered, the BAP denied the purported election as untimely and dismissed the appeal for failure to prosecute.

Armstrong argues that he in fact timely paid the fees but that the bankruptcy court clerk arbitrarily applied his payment to another pending appeal for which no fees had yet been paid. This contention springs from the fact that, on May 20, 2002, Armstrong did apparently tender a filing fee to the bankruptcy court but did not indicate to which of his four pending and unpaid-for appeals he wanted the fee applied. The clerk applied the fee to the oldest of the four pending appeals, docket number 906, which was the appeal of a clarification order and which appeal apparently remains pending in the district court. To date, Armstrong has not paid a filing fee for 00-038, the appeal of the 8002(c) denial order, or for 00-039, the appeal of the claims matter.

As for the bankruptcy court clerk's decision to apply the $105.00 filing fee to the oldest appeal, we have no problem with that procedure, particularly in light of the fact that Armstrong did not specify at the time he paid the fee which of his four pending appeals he wished to pay for. Other than in instances of an abuse of discretion, which is not present here, the bankruptcy court has full authority to manage its

docket. *Cf. Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.*, 296 F.3d 982, 985 (10th Cir. 2002) (discussing district court's discretion to manage its docket).

Bankruptcy Rule 8001(a) requires that the prescribed fee be paid at the time a notice of appeal is filed. The editors' comment to that rule, however, notes that, other than the filing of the notice of appeal itself, the "[o]ther steps to perfect an appeal should be promptly taken, but untimeliness is not necessarily fatal to the appeal." Fed. R. Bankr. P. 8001 cmt. (a) (Norton, 2d ed. at 547). At the grace of the BAP, Armstrong was given until May 20, 2002, to file the fee for the amended" notice of appeal he had filed on April 26. By May 22, he had still not paid the fee. There is no authority for Armstrong's "mail rule" under which he argues he had until May 23 to pay the fee. Bankruptcy Rule 9006(f) does not apply here because there is no service involved in the payment of a filing fee. *See* Fed. R. Bankr. P. 9006(a) (explaining computation of time in bankruptcy courts). The BAP was well within its authority to dismiss appeal No. 02-038 for failure to prosecute.

With regard to the notice-of-election issue, Armstrong argues that, because the BAP unexpectedly construed his "amended" notice of appeal as two new appeals, he was not able to file the notice of election when he filed the "amended" notice of appeal. There is no merit in this position. Armstrong, in filing his "amended" notice of appeal, was attempting to graft two new orders onto appeal No. 02-011.[1] That appeal had already been docketed

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[1] Both the 8002(c) denial order and the claims order were final and appealable because both orders disposed of the "particular adversary proceeding or [ ] discrete controversy." *Ahammed v. Secs. Investor Protection Corp. (In re Primeline Secs. Corp.)*, 295 F.3d 1100, 1105 n.6 (10th Cir. 2002).

without a notice of election.

Conversely, if Armstrong had had his way, all of the orders would have been considered in case No. 02-011 over which the BAP had jurisdiction by virtue of his failure to file a notice of election when he filed the original 02-011 notice of appeal. As the BAP noted, "to the extent that the Appellant sought to add the order that is the subject of the instant appeal to appeal number UT-02-011, he consented to the jurisdiction of this Court." Aplee. Supp. App. at 75.

Even as a pro se litigant, Armstrong is required to comply with rules of civil procedure. See Ogden v. San Juan County, 32 F.3d 452, 455 (10th Cir. 1994). As such, he is on notice that those rules do not recognize anything resembling his attempt to "amend" an already untimely notice of appeal with the addition of two new final orders. He should, therefore, have filed his notice of election at the same time he filed his purported "amended" notice, aware that the BAP would do exactly what it did and construe the "amended" notice as two new notices.

Finally, Armstrong has filed supplemental authority in the form of two decisions from the BAP holding that certain sanctions imposed by the bankruptcy court for criminal contempt exceeded that court's jurisdiction. Those decisions have no relevance in this appeal and do not undermine the general jurisdiction of the bankruptcy court over the Armstrong bankruptcy matters.

Because this court finds Armstrong's allegation of poverty to be untrue based on the fact that he has allocated $750.00 per month for his litigation expenses, his motion to proceed on appeal without prepayment of costs or fees is DENIED, and Armstrong is directed to make immediate payment of the balance of his appellate filing

fee. Armstrong's motion to include the pleadings and appendix from appeal 02-4101 is DENIED. Appellee Rushton's motion to strike Armstrong's opening brief and dismiss the appeal is DENIED.

Based on the false representations contained in Armstrong's motion for stay filed in this court on August 19, 2002, Appellee Steppes Apartments, Ltd., in its opposition to that motion, has requested that sanctions be imposed on Armstrong in the amount of their attorney's fees and costs.[2] We may not award such a sanction under Rule 38, however, without a separately filed motion or notice. See Fed. R. App. P. 38, advisory committee's note (1994 Amendment). Nevertheless, we have concluded that Armstrong's conduct both here and in the bankruptcy court cannot be overlooked.[3] Therefore, we now invite the defendants, within fifteen days from the date of this order, to file a separate motion for sanctions in which they apprise this court of the reasonable and necessary attorney's fees and costs incurred by them in opposing the motion for stay. Armstrong will then have fifteen days from the filing of defendants' motion to show cause why he should not be sanctioned. Any sanction approved by this court shall include the additional condition *that the* Clerk of Court for this circuit shall not accept any new appeals from Armstrong in any civil matters, excluding habeas corpus petitions, until Armstrong has certified, under oath, that he has satisfied the sanctions.

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[2] Steppes filed its opposition to the stay and request for sanctions three days after this court had denied the motion, thus the stay panel did not address the sanctions issue. The clerk referred the request for sanctions to the panel assigned to address the merits.

[3] There is no prohibition against imposing sanctions against a pro se litigant. *Haworth v. Royal (In re Haworth),* 347 F.3d 1189, 1192 (10th Cir. 2003) (imposing sanctions under Fed. R. App. P. 38 for frivolous appeal)

The judgment of the BAP is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Bobby R. Baldock
Circuit Judge

APPENDIX E
UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

In re: DONALD E. ARMSTRONG, Debtor.	(BAP No. UT-02-038)
DONALD E. ARMSTRONG, Appellant, v. KENNETH A. RUSHTON, Trustee; STEPPES APARTMENTS, LTD.; STEVEN R. BAILEY, Trustee; and UNITED STATES TRUSTEE, Appellees.	Bankr. No. 00B-26592 Chapter 11 ORDER DENYING ELECTION AND DISMISSING APPEAL May 22, 2002

Before PUSATERI, BOHANON, and MICHAEL, Bankruptcy Judges.

The matter before the Court is the Notice of Election to Appeal District Court ("Election"), filed May 20, 2002, but Appellant Donald E. Armstrong.

Section 158(c)(1) of Title 28, United States Code, provides in its relevant part that "each appeal ... shall be heard by a 3-judge panel of the bankruptcy appellate panel service . . . unless—(A) the appellant elects at the time of filing the appeal." 28 U.S.C. § 158(c)(1). The form of this election is set forth in Fed. R. Bankr. P. 8001, which provides in its relevant part that "[a]n election to have an appeal heard by the district court under 28 U.S.C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U.S.C. § 158(c)(1)." Fed. R. Bankr. P. 8001(e) Because the Election was not filed with the notice of appeal, it is untimely.

The Appellant argues that the should be given additional time to file an election because the notice of appeal was not a new notice of appeal that he filed; instead the notice of appeal was construed by this Court from the Appellant's filing an amended notice of appeal in appeal number UT-02-011, which is currently pending before this Court. The Appellant's arguments do not proved any authority under which this Court can extend the time for filing an election. Further, to the extent that the Appellant sought to add the order that is the subject of the instant appeal to appeal number UT-02-011, he consented to the jurisdiction of this Court.

On May 10, 2002, this Court entered an order requiring the Appellant to pay the filing and docketing fees within ten days, or the appeal would be dismissed without further notice. The ten days has expired, and it appears that the Appellant has

not paid the filing and docketing fees. The appeal will therefore be dismissed for failure to prosecute.

Accordingly, it is HEREBY ORDERED that the Election is DENIED. This appeal is DISMISSED.

For the Panel:

Barbara A. Schermerhorn, Clerk of the Court
By: /s/
Deputy Clerk

APPENDIX F
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals Tenth Circuit
MAY 27 2004
PATRICK FISHER
Clerk

In re: DONALD E. ARMSTRONG, Debtor.	
DONALD E. ARMSTRONG, Appellant, v. KENNETH A. RUSHTON, Trustee; STEPPES APARTMENTS, LTD.; JOHN L. FEECE, Appellees.	No. 03-4170 (BAP No. UT-03-017) (BAP)

ORDER AND JUDGMENT*

Before McCONNELL, ANDERSON, and BALDOCK, Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Appellant Donald E. Armstrong appeals the dismissal by the Bankruptcy Appellate Panel (BAP) of his underlying appeal for failure to file a timely opening brief. He also takes issue with the BAP's refusal to entertain his motion for reconsideration. We affirm.

After having received one extension of time until May 22, 2003, in which to file his opening brief to the BAP in this matter, Armstrong requested yet another extension, asking that his brief not be due until July 3, 2003. The BAP denied the second motion for extension and ordered Armstrong to file his brief "within five (5) days of the date of this Order." Aplt. App. at 1. The order is dated May 28; relying on Bankruptcy Rule 9006(a), five days from the date of the order, excluding weekends, was June 4, 2003. Armstrong filed his brief on June 6, 2003, and the BAP dismissed the appeal, citing Bankruptcy Rule 8001(a). Armstrong filed an untimely motion to reconsider on the same day the BAP issued its mandate. That motion was denied.

Armstrong initially contends that it was reversible error for the BAP to deny his second motion for extension of time to file his opening brief. Matters such as this are left to the discretion of the court. *Nielsen v. Price,* 17 F.3d 1276, 1277 (10th Cir. 1994) (finding no abuse of discretion in dismissing bankruptcy appeal because of untimely-

filed brief); *cf. Panis v. Mission Hills Bank, N.A., 60* F.3d 1486, 1494 (10th Cir. 1995) (finding no abuse of discretion in permitting late filing under Federal Rules of Civil Procedure); *see also* Fed. R. Bankr. P. 9006(b)(1). Given the fact that Armstrong had already received an extension of more than thirty days in which to file his brief, we perceive no abuse of discretion in refusing to grant a further extension.

On appeal, Armstrong argues that the "mailbox rule" should have been applied both to his initial brief and to his motion for reconsideration, making both filings timely. We disagree. Armstrong misunderstands the mailbox rule which does not apply here.

Bankruptcy Rule 9006(f) provides in pertinent part:

> When there is a right or requirement to do some act or undertake some proceedings *within a prescribed period after service of a notice or other paper* and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ. P., three days shall be added to the prescribed period.

Fed. R. Bankr. P. 9006(f) (emphasis added). Armstrong insists that this rule allowed him three extra days in which to file his brief and his subsequent motion. What he loses sight of, however, is that the order denying his second motion for an extension did *not* provide that he had five days after *service of* the order in

which to file his brief. It said he had five days from the date the order was filed within which to file his brief. The mailbox rule is inapplicable to this situation. *Arbuckle v. First Nat 'l Bank of Oxford (In re Arbuckle), 988* F.2d 29, 31-32 (5th Cir. 1993) (holding three-day extension not applicable to filing notice of appeal because time ran from entry of order, not from service).

The same analysis applies to Armstrong's motion for rehearing. As explained by the BAP, Bankruptcy Rule 8015 requires that a motion for rehearing "be filed within 10 days after the entry of the judgment." The judgment dismissing the appeal was entered on June 18, 2003. Armstrong's motion for rehearing was therefore due on or before June 30, 2003. The event triggering the time clock for filing the motion for rehearing was the entry of the judgment of dismissal. There was no requirement that Armstrong file his motion for rehearing at some date after the service of a notice or other paper. Armstrong was required to file, if at all, within ten days after entry of the judgment. Again, because the mailbox rule applies to situations where the applicable rule requires an act within a period of time after a notice or other paper is first served, it does not apply in this situation.

Contrary to Armstrong's interpretation, the information provided litigants on this circuit's website regarding various filing deadlines is no different. Those directions clearly instruct litigants in the very first line that "[i]f ordered by a date

certain, the 3 day mailing rule **does not** apply." *See* "Answers to Frequently Asked Questions" at http:l/www.cal0.uscourts.gov/rules.cfm?part=2. The dates at issue here were both "dates certain." Five days from the date of the order denying the second motion for extension, not counting weekends, was June 4, 2003; ten days from the date of the entry of judgment dismissing the appeal, counting weekends, was June 30, 2003. There was nothing uncertain about these dates. Armstrong's brief and motion for rehearing were both late.

In addition to the fact that Armstrong's motion for reconsideration was untimely, we note that the BAP had issued its mandate on July 1, 2003, thus effectively losing appellate jurisdiction over this case. Without jurisdiction, the BAP had no authority to extend the time for filing the motion. *See Boston & Maine Corp. v. Town of Hampton,* 7 F.3d 281, 282 (1st Cir. 1993).

As for Armstrong's other issues, he did not make an argument based on "excusable neglect" to the BAP, either when he filed his untimely brief or in his untimely motion to reconsider, *see generally Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380 (1993), so we will not consider it for the first time on appeal, *see Walker v. Mather (In re Walker), 959* F.2d 894, 896 (10th Cir. 1992). Even if we were to make an exception here, we are not persuaded that Armstrong's actions in this matter constituted "neglect" in the legal sense.

The fact that this court has, on occasion, allowed late filings by Armstrong and perhaps others has no relevance in this matter. The BAP is fully within its authority to manage its own docket. *See Span-Eng Assocs. v. Weidner*, 771 F.2d 464, 470 (10th Cir. 1985).

The order denying Armstrong's second request for extension explicitly states that "[t]he Appellant's brief and appendix must be filed within five (5) days of the date of this Order, or this appeal will be dismissed without further order." There is thus no basis upon which Armstrong can legitimately argue that the dismissal came as a surprise to him or that a show cause order should have issued before the BAP dismissed the appeal. Finally, Armstrong, albeit proceeding pro se, is required to comply with rules of procedure. *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994).

As we have noted in several other decisions issued this day, the fact that the BAP has recently found that the bankruptcy court lacked jurisdiction to enter criminal contempt sanctions against Armstrong in a related matter has no bearing on this appeal. Armstrong's motion to file a supplemental appendix is GRANTED. The judgment the bankruptcy appellate panel is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court
Bobby R. Baldock
Circuit Judge

APPENDIX G
UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

In re: DONALD E. ARMSTRONG, Debtor.	(BAP No. UT-03-017)
DONALD E. ARMSTRONG, Appellant, v. KENNETH A. RUSHTON, Trustee; STEPPES APARTMENTS, LTD.; JOHN L. FEECE, Appellees.	Bankr. No. 00B-26592 Chapter 11 ORDER DISMISSING APPEAL June 18, 2003

Before McFEELEY, Chief Judge, and NUGENT, Bankruptcy Judges.

On May 28, 2003, this Court entered an Order Denying Second Extension of Time ("Order"), requiring the Appellant to file his brief and appendix within five (5) days of the date of the Order, or the appeal would be dismissed without further order. The Appellant did not comply with the Order.

Accordingly, it is HEREBY ORDERED that this appeal is DISMISSED. Fed. R. Bankr. P. 8001(a).

For the Panel:

Barbara A. Schermerhorn,
Clerk of Court

By: /s/
Deputy Clerk

APPENDIX H

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH, CENTRAL DIVISION

ENTERED

FEBRUARY 10, 2003

In re:	Bankruptcy No. 00-26592-JAB Chapter 11
DONALD E. **ARMSTRONG,** Debtor. SSN; 308-56-3353	Honorable Judith A. Boulden

ORDER

On this (unreadable) day of February, 2003, the Motion to Pursue Claims and Rights Against Steppes Apartments, Ltd, and John L. Feece filed by the Debtor came before the Court for consideration. After a review of the above-referenced pleading, this Court does hereby enter the following findings and conclusions in conformity with Rule 7052, Fed. R. Bankr. P., in this core proceeding.

Armstrong seeks to (1) assert claims against Steppes Apartments, Ltd. ("Steppes") and John L. Feece ("Feece") for the "taking" of his post-bankruptcy petition assets and rights; (2) to file a declaratory action to determine Steppes and Feece have no bankruptcy claims against the Debtor; (3) a determination that the Court has no jurisdiction over the Debtor's post-bankruptcy petition rights and claims involving Steppes, Feece or Steppes parties; and (4) to allow the Debtor to file a proof of claim for Steppes in the Chapter 13

case.

First, the Court will address the filing of a proof of claim for Steppes in the Chapter 13 case. This Motion was filed in the Chapter 11 case which is inappropriate. Further, the Chapter 13 case was dismissed and an Order denying the Debtor's Motion to Stay, Vacate or Amend the Dismissal Order has been entered. Thus, there is no Chapter 13 case in which to file a proof of claim.

Next, Armstrong seeks to assert a claim against Steppes and Feece for the taking of his post-bankruptcy petition assets and rights. The Court believes that Armstrong is referring to his post-petition beneficiary rights in the trust which he continually argues remain his property. In this Court's Order finding the Debtor in contempt filed October 22, 2002, the Court reminded the Debtor of Judge Boulden' s findings in the confirmation order that "all assets of the trust became property of the estate on the date of the filing of the petition."

Next, Armstrong seeks a declaratory ruling that Steppes and Feece have no post-bankruptcy claims against the Debtor. The Court is not aware that Steppes or Feece are asserting or will assert any claims against the Debtor.

Lastly, Armstrong seeks a ruling that the Court has no jurisdiction over the Debtor's post-petition rights and claims involving Steppes, Feece or the Steppes parties. The confirmation order provides:

> 10. Retention of Jurisdiction. The Court shall retain exclusive jurisdiction of this case for the purposes set forth in the Plan, including without limitation, to adjudicate all controversies concerning the classification or allowance of claims, to make such Orders as are necessary or appropriate to aid the consummation of the Plan and to ensure the implementation of the provisions of the Plan and this Order in the manner provided under Section 1142 of the Code and Fed. R. Sankt. P. 3020(d).

Until there is a controversy, the Court is unable to determine whether it has jurisdiction over the matter. The Court has retained jurisdiction over some issues as set forth in the confirmation order. For these reasons, the Court finds that the Motion should be denied.

IT IS THEREFORE ORDERED that the Motion to Pursue Claims and Rights Against Steppes Apartments, Ltd. and John L. Feece is **denied.**

/s/
TOM R. CORNISH
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Order, postage prepaid, this 7th day of February, 2003, to the following:

Donald E. Armstrong
P.O. Box 1059
Park City, UT 84060

Lon Jenkins
LeBOEUF, LAMB, GREENE & MacRAE, L.L.P.
136 South Main Street, Suite 1000
Salt Lake City, UT 84103

Kenneth A. Rushton
99 West Main Street, #212
P.O. Box 202
Lehi, UT 84043

Jeffrey L. Shields
Zachary T. Shields
CALLISTER, NEBEKER & McCULLOUGH
10 East South Temple, #900
Salt Lake City, UT 84133

United States Trustee
9 Exchange Place, Suite 100
Salt Lake City, UT 84111

/s/
Tina Coates

APPENDIX I
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals Tenth Circuit
MAY 27 2004
PATRICK FISHER
Clerk

In re: DONALD E. ARMSTRONG, Debtor.	
DONALD E. ARMSTRONG, Appellant, v. KENNETH A. RUSHTON, Trustee; STEPPES APARTMENTS, LTD., Appellees.	No. 03-4177 (BAP No. UT-02-007) (BAP)

ORDER AND JUDGMENT*

Before McCONNELL, ANDERSON, and BALDOCK, Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Appellant Donald E. Armstrong appeals a judgment of the Bankruptcy Appellate Panel of this Circuit (BAP) affirming a temporary allowance order and rejecting Armstrong's argument that the order was void because the bankruptcy judge eventually recused herself. Our jurisdiction arises under 28 U.S.C. § 158(d) and, although we are reviewing a judgment of the BAP, we independently review the underlying decision of the bankruptcy court. *United States v. Myers (In re Myers), 362* F.3d 667, 670 (10th Cir. 2004).

We review the decision to allow a temporary claim under the Federal Rules of Bankruptcy Procedure § 3018(a) for abuse of discretion. *See generally In re Marin Town Ctr., 142* B.R. 374, 379 (N.D. Cal. 1992). Under that standard, the decision of the bankruptcy court will not be overturned unless we are firmly and definitely convinced that the court made a clear error of judgment or exceeded the bounds of permissible choice. *Moothart v. Bell,* 21 F.3d 1499, 1504 (10th Cir. 1994).

In his opening brief, Armstrong lists eleven issues, many of which have nothing to do with the temporary allowance order that is the subject of this appeal. Those extraneous issues either go to the validity of the confirmed plan[1]

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[1] We have today held that the BAP correctly dismissed the appeal from the bankruptcy court order confirming the plan. *See Armstrong v. Rushton,* No. 02-4101 (10th Cir._____2004).

or to cases and judgments over which this court has no jurisdiction.

With respect to the temporary allowance order, we have reviewed the briefs, the record, and the applicable law pursuant to the above-mentioned standards, and we determine that Armstrong has established no reversible error in this case. As we have noted in several other decisions issued this day, the fact that the BAP has recently found that the bankruptcy court lacked jurisdiction to enter criminal contempt sanctions against Armstrong in a related matter has no bearing on this appeal. Armstrong's motion to file a supplemental appendix is GRANTED. The judgment of the BAP is AFFIRMED for substantially the same reasons stated by that panel in its order filed May 9, 2003. The mandate shall issue forthwith.

Entered for the Court

Bobby R. Baldock
Circuit Judge

APPENDIX J
UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT
FILED
June 24, 2003

IN RE DONALD E. ARMSTRONG, Debtor.	BAP No. UT-02-007
DONALD E. ARMSTRONG, Appellant, v. KENNETH A. RUSHTON, Trustee, and STEPPES APARTMENTS, LTD., Appellees.	Bankr. No. OOB-26592 Chapter 11

JUDGMENT
Filed June 24, 2003

Before McFEELEY, Chief Judge, BOHANON, and CORDOVA, Bankruptcy Judges.

This case originated in the United States Bankruptcy Court for the District of Utah.

The judgment of that court is AFFIRMED.

For the Panel:

Barbara A. Schermerhorn,
Clerk of Court
By: /s/
Deputy Clerk

PUBLISH

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT

FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
June 24, 2003
Barbara A. Schermerhorn, Clerk

IN RE
DONALD E. ARMSTRONG,
Debtor.

BAP No. UT-02-007

DONALD E. ARMSTRONG,
Appellant,

v.

KENNETH A. RUSHTON,
Trustee, and
STEPPES APARTMENTS, LTD.,

Appellees.

Bankr. No. 00B-26592
Chapter 11

OPINION

Appeal from the United States
Bankruptcy Court for the District of Utah

Donald E. Armstrong, pro se.

Lon A. Jenkins (Penrod W. Keith with him on the brief), of LeBoeuf, Lamb, Greene & MacRae, L.L.P., Salt Lake City, Utah, for Appellee Kenneth A. Rushton.

Jeffrey L. Shields (Zachary T. Shields with him on the brief), of Callister Nebeker & McCullough, Salt Lake City, Utah, for Appellee Steppes Apartments, Ltd.

Before McFEELEY, Chief Judge, BOHANON, and CORDOVA[1], Bankruptcy Judges.

McFEELEY, Chief Judge.

Donald E. Armstrong ("Armstrong") appeals an Order of the United States Bankruptcy Court for the District of Utah that temporarily allowed a claim by Appellee Steppes Apartments Ltd., for voting purposes in Armstrong's Chapter 11 Plan. Armstrong argues that the Temporary Allowance Order erred in calculating the disputed claim, violated his constitutional rights, and was invalid because of bias. We affirm.

I. Background

Donald E. Armstrong created two trusts in which he was the beneficiary and trustee: the Donald E. Armstrong Family Trust ("Family Trust"), created in 1983, and the Donald E. Armstrong Charitable Remainder Unitrust ("Unitrust"), created in 1994 (hereinafter, when referred to jointly, "the Trusts"). In the mid-1990s, a real estate transaction took place between Steppes Apartments, Ltd. ("Steppes") and the Trusts in which Steppes partially financed the purchase of an apartment building from the Trusts with two promissory Notes ("Notes"), one payable to the Family Trust and one to the Unitrust. After the Trusts accelerated payment on the Notes and imposed a high default interest rate, a series of

[1] The Honorable Donald E. Cordova, Chief Bankruptcy Judge for the District of Colorado, heard oral argument in this appeal but passed away February 16, 2003. Prior to his death, he had considered this matter fully and participated in the panel's conference and resulting decision.

lawsuits occurred in Texas state courts. In 1997, Steppes obtained a judgment solely against the Trusts. The judgment included certain penalties under Texas usury statutes and a forfeiture of the underlying Notes issued by Steppes to the Trusts ("Texas Modified Judgment"). The Trusts appealed the Texas Modified Judgment through the Texas appeal courts and lost at every appellate level, concluding in June 23, 2002, with a denial of certiorari by the United States Supreme Court.[2]

After the entry of the Texas Modified Judgment, Armstrong caused the Family Trust to transfer its assets to him personally.[3] This transfer precipitated a series of lawsuits in the Utah state and federal courts. In the Utah courts, Steppes proceeded against the Family Trust and against Armstrong individually, initially alleging only fraudulent transfer of property. During the course of the litigation, Steppes amended its original complaint to assert additional claims against Armstrong based on theories of alter ego, civil conspiracy, constructive trust, and unjust enrichment. After Steppes filed the Amended Complaint, Mountain Pacific Ventures ("MPV") was added as a defendant. Armstrong was the president, director, treasurer, and registered agent of MPV. The Family Trust was the sole shareholder of MPV. MPV filed a notice of a Chapter 11 bankruptcy petition on March 10, 1999, and soon after

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[2] The total amount owed to Steppes and its principal John Feece under the Texas Modified Judgment including fees and interest to the date of Armstrong's bankruptcy filing is $1,579,283.90. Of that amount, $1,005,713.08 is owed pursuant to the award against the Family Trust, and $573,570.06 is owed pursuant to the award against the Unitrust.

[3] In May 1997, in accordance with the Utah Foreign Judgment Act, Utah Code Ann. 78-22a-1 (1953) et seq., the Texas Modified Judgment was filed in Utah.

was dismissed from the litigation with prejudice. Ultimately, by minute entry dated March 1, 2000, the Utah state court ruled that it would enter a default judgment against Armstrong as a result of Armstrong's failure to comply with court orders related to discovery ("Utah Default Ruling"). The Utah Default Ruling determined Armstrong's liability to Steppes, but reserved the issue of Steppes's remedy for a later hearing.

Before the Utah Default Ruling against Armstrong was memorialized as a written order, Armstrong filed a voluntary petition for relief under Chapter 11 in the United States Bankruptcy Court for the Southern District of California on March 10, 2000. Because that court found that venue was not proper in California, Armstrong's case was transferred to the Utah bankruptcy court. Creditors moved to remove Armstrong as debtor-in-possession, for, among other things, impropriety in the administration of the estate. In September 2000, Appellee Kenneth A. Rushton ("Rushton"), was appointed Chapter 11 trustee for Armstrong's estate.

On September 8, 2000, Steppes filed Claim 27 ("Claim 27") for an undetermined amount in the Chapter 11 case. Claim 27 set forth the following three grounds in support of Steppes's claim against the estate: (1) claims based on the Utah Default Ruling for fraudulent transfer, conspiracy, alter ego, constructive trust, unjust enrichment; (2) claims based on Steppes's Nondischargeability Complaint filed in Armstrong's Chapter 11 case for malicious prosecution, abuse of process, or wrongful use of civil proceedings; and (3) a claim to the extent that the bankruptcy estate is the successor in interest to the Trusts under the Modified Agreement. Armstrong filed an objection to Claim 27. Initially,

Rushton joined in the objection.

In June 2001, Rushton entered into a settlement with Steppes ("Steppes Settlement") and Roger G. Segal, Trustee in bankruptcy of MPV. The Steppes Settlement provided that in exchange for Steppes's claims against Armstrong, Steppes would be allowed a secured claim of $120,795 and a contingent unsecured claim of $1,398,979 in Armstrong's Chapter 11 case.[4] After entering into the Steppes Settlement, Rushton moved to stay his objection to Claim 27. Armstrong objected to the Steppes Settlement. The objections to Claim 27 were converted to an adversary proceeding.

Steppes filed a Motion for Temporary Allowance of Claim and Supporting Memorandum ("Motion"). The Motion sought to have Steppes's claims temporarily allowed for voting purposes on the Trustee's Plan. In its Motion, Steppes asserted claims based on the following: fraudulent transfer, alter ego, default judgment, abusive litigation, judgment liens.[5] Armstrong objected to the Motion.

The bankruptcy court held an evidentiary

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[4] With respect to the contingent unsecured claim, the Steppes Settlement provides that if Rushton cannot take control of the Texas litigation, Steppes shall be allowed a compromise unsecured claim of $1,398,979.

[5] In its Motion, Steppes asserted that its various claims were secured in the following amounts: (1) the fraudulent transfer claim in the amount of $1.1 million; (2) the alter ego claim in the amount of $1.8 million; (3) the default judgment claim in the amount of $1.1 million; (4) the judgment lien claim in the amount of the value of the American Flag property subject to senior liens and limited by the amount of the Texas Modified Judgment against the Family Trust of approximately $1.1 million. Steppes further asserted that its abusive litigation claim was unsecured in an amount somewhere between one and two million.

hearing on the Motion. The hearing took five days. During the hearing, at which Armstrong was present, several witnesses testified and numerous documents were introduced as evidence. Subsequently, the bankruptcy court entered an Order temporarily allowing for voting purposes Steppes's claims only as delineated in the Steppes Settlement ("Temporary Allowance Order"). The bankruptcy court found that with respect to Steppes's claims of abuse of process and wrongful use of civil proceedings, although Steppes had presented the court with compelling evidence to substantiate those claims, Steppes had not presented the court with sufficient information to enable the bankruptcy court to estimate them; therefore, these claims were allowed at zero.

Rushton filed a Trustee's Second Revised Plan of Reorganization Dated November 19, 2001 ("Trustee's Plan"). The Trustee's Plan was circulated to creditors for voting along with a disclosure statement approved by the court pursuant to § 1125(a). Steppes's estimated unsecured claim of $1,398,979 was classified as Class 4 of the Trustee's Plan and based on a ballot previously filed by Steppes, was counted as a vote in favor of confirmation of the Trustee's Plan. Steppes's secured claim of $120,795 was counted as a vote in favor of the Trustee's Plan in Class 2A. The confirmation hearings began on December 20, 2001. One of the issues during the confirmation hearings was approval of the Steppes Settlement.

On January 31, 2002, the bankruptcy court entered Findings of Fact, Conclusions of Law and Order Confirming and Approving Trustee's Second Revised Plan of Reorganization Dated November 19, 2001 and Granting Related Motion on January 31, 2002 ("Confirmation Order"). In the Confirmation Order, the bankruptcy court found that Class 4 had

accepted the Trustee's Plan[6] and that, alternatively,

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[6] Class 4 was comprised of unsecured claims totaling approximately $1,694,034.09. In a Trustee Voting Rights Motion ("Voting Motion"), a creditor, Steven R. Bailey, Chapter 7 Trustee for Willow Brook Cottages, LLC. ("Bailey") asked the bankruptcy court to determine who could vote certain disputed claims. The Voting Motion was heard and the bankruptcy court made findings of fact and conclusions of law on the record on January 15, 2002, concluding that Bailey held 70% of the disputed claims and Armstrong held 30% of the disputed claims. Later, Armstrong purported to vote the full amount of each of the disputed Class 4 Claims as rejecting claims while Bailey voted whatever portion of the disputed Class 4 Claims he held. In voting the Disputed Class 4 Claims, Bailey asserted his right as the majority owner of the claims to vote the full amount as accepting the Trustee's Plan. In the Confirmation Order, the bankruptcy court found as follows:

> Whether the Trustee votes the full amount of the Disputed Class 4 Claims or 70% of them, or whether each of these claims is treated as two claims for voting purposes to be voted by the Trustee and the Debtor, Class 4 has voted to accept the Plan because creditors who hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by such creditors have voted to accept the Plan. 11 U.S.C. § 1126(c).

Confirmation Order at 6, in Rushton's App. at 196. In a footnote, the bankruptcy court further explained:

> If the Trustee is permitted to vote the full amount of the Disputed Class 4 Claims, then 8 Claims voting in that Class voted to accept the Plan and 4 voted to reject, with claims totaling $1,604,25[9].22 voting to accept and $89,774.87 voting to reject the Plan. If the Trustee is permitted to vote 70% of each Disputed Class 4 Claim and the Debtor 30% (with the Disputed Class 4 Claims being split for purposes both of number of claims voting and for amounts voted, then the voting in Class 4 is 7.1 votes to accept the Plan and 4.9 votes to reject the Plan, with claim amounts totalling

the Trustee's Plan could be confirmed over the dissent of Class 4 because the Trustee's Plan satisfied the "cram down" provisions in § 1129(b) with respect to Class 4. The bankruptcy judge further found that Class 2A had accepted the Trustee's Plan as had Class 2C, which was the impaired claim of Zion's Bank. In the Confirmation Order, the bankruptcy judge also approved the Steppes Settlement.

Armstrong appealed the Confirmation Order to this Court. He also filed a motion asking the bankruptcy court to enlarge the time for filing a notice of appeal of the Confirmation Order. The bankruptcy court denied that motion, and he appealed. Both appeals were dismissed by panels of this Court, see BAP Nos. UT-02-011, UT-02-038, and have been further appealed to the Tenth Circuit.

Armstrong timely appealed the Temporary Allowance Order.

II. Standard of Review

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and

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> [sic] $1,569,024.76 in favor of the Plan and $125,009.33 against the Plan. If each of the Disputed Class 4 Claims is split so that each would be counted as two votes in Class 4, but the Trustee would vote 70% of each Disputed Class 4 Claim and the Debtor 30% of each Disputed Class 4 Claim, the result would be 8 votes to accept the Plan, 4 votes to reject the Plan, with claims totaling $1,569,024.76 in favor of the Plan and $125,009.33 against the Plan. In each of these three alternative scenarios, the requirements of Section 1126(d) for acceptance of the Plan are met with respect to Class 4.

Id. at 6-7 n.3, in Rushton's App. at 196-97.

matters of discretion (reviewable for 'abuse of discretion')." Pierce v. Underwood, 487 U.S. 552, 558 (1988); see Fed. R. Bankr. P. 8013. *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision. Salve Regina College v. Russell, 499 U.S. 225, 238 (1991).

A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'" Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting LeMaire v. United States, 826 F.2d 949, 953 (10th Cir. 1987)). In reviewing findings of fact, we are compelled to give due regard to the opportunity of the bankruptcy court to judge the credibility of witnesses. Fed. R. Bankr. P. 8013.

Armstrong claims, without legal support, that he is entitled to de novo review on the merits. However, a judge's decision to temporarily allow a claim under Federal Rule of Bankruptcy Procedure 3018(a) is reviewed for abuse of discretion. See generally In re Morin Town Ctr., 142 B.R. 374, 379 (N.D. Cal. 1992). "Under the abuse of discretion standard: 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances."' Moothart v. Bell, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting McEwen v. City of Norman, 926 F.2d 1539, 1553-54 (10th Cir. 1991) (further quotation omitted)). As with the clearly erroneous standard, when applying the abuse of discretion standard, deference is given to the

bankruptcy court "'because of its first-hand ability to view the witness or evidence and assess credibility and probative value.'" Id. (quoting McEwen, 926 F.2d at 1553-54).

III. Discussion

As a preliminary matter, we must consider our jurisdiction over this appeal. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986). Procedurally, we have jurisdiction. The bankruptcy court's order is a final order subject to appeal under 28 U.S.C. § 158(a)(1). See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996). Armstrong timely filed his notice of appeal pursuant to Federal Rule of Bankruptcy Procedure 8002. All parties have consented to this Court's jurisdiction by failing to elect to have the appeal heard by the United States District Court for the District of Utah. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001. However, both Armstrong and Rushton question this court's subject matter jurisdiction.

Armstrong asks that this Panel recuse itself from deciding the merits of the appeal on the grounds that we are biased and cannot effectively review other bankruptcy judges who are our peers. He has offered no legal or factual basis for this contention. We conclude that there is no merit in this request and deny it. See Bryce v. Episcopal Church in Diocese of Colo., 289 F.3d 648, 659-60 (10th Cir. 2002) (finding "[t]he recusal statute should not be construed so broadly as to become presumptive or to require recusal based on unsubstantiated suggestions of personal bias or prejudice.").

Rushton argues that we do not have jurisdiction over this appeal for the following two reasons: (1) the appeal is an improper attempt to appeal an ancillary order; (2) the appeal is moot.

First, Rushton argues that this appeal is not properly before us because it is really a collateral attack on the Confirmation Order. To support this argument, Rushton indicates that the bankruptcy court approved the Steppes Settlement in the Confirmation Order. Therefore, Rushton concludes, the terms of the Temporary Allowance Order were incorporated into the Confirmation Order and cannot be changed in the absence of an appeal of the Confirmation Order. This argument fails.

A reference to a previous order cannot turn two separate orders into one. While Rushton may be correct in asserting that one of the reasons for this appeal is to overturn the Confirmation Order, the purpose behind an appeal cannot alone defeat it. The Temporary Allowance Order was a separate order from the Confirmation Order. Armstrong timely appealed it. We have the jurisdiction to consider it.

Second, Rushton argues that this appeal is not properly before us because it is moot. The Constitution authorizes federal courts to hear only "cases" or "controversies." See U.S. Const., Art. III § 2, cl. 1. If there is no live case or controversy as mandated by the constitution then an appeal will be moot. See Out of Line Sports, Inc. v. Rollerblade, Inc., 213 F.3d 500, 501 (10th Cir. 2000). A controversy is no longer "live" if the reviewing court cannot render "any effectual relief whatever." Church of Scientology v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)); see also Egbert Dev. LLC. v Community First Nat'l Bank (In re Egbert Dev.), 219 B.R. 903 (10th Cir. BAP 1998). A party must seek only that relief that is "'capable of addressing the alleged harm.'" Nat'l Advertising Co. v. City and County of Denver, 912 F.2d

405, 411 (10th Cir. 1990) (quoting Blinder, Robinson & Co. v. United States Sec. & Exch. Comm'n, 748 F.2d 1415, 1418 (10th Cir. 1984)).

The appeal here focuses on a Temporary Allowance Order entered in accordance with the provisions of Federal Rules of Bankruptcy Procedure 3018(a). Pursuant to Rule 3018(a), a bankruptcy judge after notice and a hearing "may temporarily allow the claim or interest [of a creditor] in an amount which the court deems proper for the purpose of accepting or rejecting a plan." Fed. R. Bankr. P. 3018(a). A creditor may request the temporary allowance of a claim under one of the following nonexclusive circumstances: when an objection to the claim has been filed and "the objection was filed too late to be heard prior to the confirmation hearing, when fully hearing the objection would delay administration of the case, or when the objection is frivolous or of questionable merit." See 9 Collier on Bankruptcy 113018.01[5] (Lawrence P. King ed., 15th ed. 2003) (footnotes omitted); In re Zolner, 173 B.R. 629, 633 (Bankr. N.D. Ill. 1994), aff'd, 249 B.R. 287 (N.D. Ill. 2000). The policy behind temporarily allowing claims is to prevent possible abuse by plan proponents who might ensure acceptance of a plan by filing last minute objections to the claims of dissenting creditors. Stone Hedge Properties v. Phoenix Capital Corp. (In re Stone Hedge Properties), 191 B.R. 59, 64 (Bankr. M.D. Pa. 1995); see also 9 Collier on Bankruptcy ¶ 3018.01 [5]. Temporary allowance of a claim under Rule 3018(a) is not dispositive as the amount of the claim; it provides only limited voting authority to a creditor.

There is no guidance in the Bankruptcy Code to courts as to how to determine whether to permit the temporary allowance of a claim; it is left to a court's discretion. See Marin, 142 B.R. at 379; 9 Collier ¶ 3018.01[5]. The Bankruptcy Code also offers no guidance

on which party has the burden of proof in a Rule 3018(a) estimation proceeding. Some courts have placed the burden of proof on the claimant while other courts have placed it on the objector. See, e.g., Zolner, 173 B.R. at 633-36 (burden of proof is on the claimant); Stone Hedge, 191 B.R. at 64-65 (questioning whether burden of proof in a summary proceeding should be on the objector). Because a temporary allowance order only arises if there is an objection to a claim, we conclude that the burden of proof should be on the claimant to present sufficient evidence that it has a colorable claim capable of temporary evaluation.

The Temporary Allowance Order permitted Steppes's claim for the limited purpose of voting on the Trustee's Plan. The Trustee's Plan was approved by the creditors, and ultimately, the court entered a Confirmation Order. The resulting Confirmation Order allowed Steppes's claim as contemplated by the Settlement Agreement. The Confirmation Order was not timely appealed. Because the Settlement Agreement was approved in the Confirmation Order and by its terms the Settlement Agreement is identical to the Temporary Allowance Order, there is no relief we can offer in the absence of a timely appeal of the Confirmation Order.

Armstrong argues that this appeal is not moot because if there was no basis for temporarily allowing the claim, then the voting on the Trustee's Plan was tainted. That argument is not persuasive. First, even if there was no basis for temporarily allowing Steppes's Claim, the Steppes Settlement, which is identical in terms to the claim permitted in the Steppes's Temporary Allowance Order, was allowed in the Confirmation Order, and that order has not been timely appealed. Second,[7] we observe that even if

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[7] Although there are no provisions in the Bankruptcy Code that directly provide for what would be the

we were to find that Class 4 was a nonaccepting class, under 11 U.S.C. § 1129(b),[8] a plan may be confirmed if the plan is affirmatively accepted by at least one impaired class under § 1129(a)(10).[9] Here, the impaired Zions Bank in Class 2C affirmatively accepted the Trustee's Plan. On that basis, the Trustee's Plan could have been confirmed. Third, in the Confirmation Order the bankruptcy court found that the Trustee's Plan would have been approved even over the dissent of Class 4 under the provisions of § 1129(b). See In re Miami Trucolor Offset Service Co., 187 B.R. 767, 769 (Bankr. S.D. Fla. 1995) (finding that court was justified in refusing to temporarily allow

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nullification of Steppes's Vote after the Confirmation Order was entered, Federal Rule of Bankruptcy Procedure 3006 provides that a creditor may withdraw a claim after notice and hearing. Thereafter, under Rule 3006, an "authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of a plan." Fed. R. Bankr. P. 3006. So by analogy, on points two and three, we are proceeding under the assumption that if the Temporary Allowance Order had not been entered or were invalid, Steppes's unsecured claim in Class 4 would have been withdrawn, and without Steppes's Secured Claim there would have been no Class 2A.

[8] All future statutory references are to Title 11 of the Bankruptcy Code unless otherwise noted.

[9] In pertinent part that statute provides:

(a) The court shall confirm a plan only if all of the following requirements are met:

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

11 U.S.C. § 1129(a)(10).

claim for voting purposes because negative vote by creditor, even if counted, would not have prevented confirmation of the plan).

Section 1129(b) delineates what has been called the "cram down" provisions of the bankruptcy code. These provisions are so named because they provide that a plan may be confirmed over the dissent of a class if the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b). With respect to a class of unsecured claims, the statute further provides that the plan must offer each holder of such a claim property equivalent to the allowed amount of the claim as of the effective date of the plan or provide that any holder of a junior interest or claim will not receive or retain any property. 11 U.S.C. § 1129(b)(2)(B)(i), (ii). In this case, the bankruptcy court found that the Trustee's Plan was fair, equitable, did not discriminate, and there were no junior lienholders. The bankruptcy court concluded that under § 1129(b), the Trustee's Plan would have been confirmed even had Class 4 rejected the Trustee's Plan.

Armstrong argues that the Trustee's Plan did not meet the provisions of § 1129(b) because it falsely promised to pay all of the unsecured creditors' debt. He bases this argument on his allegations that a number of "unknown" administrative claims were presented following confirmation of the Trustee's Plan. Because under the provisions of the Bankruptcy Code these administrative claims must be paid first and therefore will deplete the funds available to pay the unsecured creditors, Armstrong concludes that the

Trustee's Plan was confirmed erroneously. That argument has no merit.

Section 1129(b) does not require full payment to unsecured creditors before a plan may be approved pursuant to its provisions.[10] Most important, the number of administrative claims presented following a plan confirmation has no bearing on whether the provisions of § 1129(b) were accurately administered or whether a temporary allowance order was correctly entered. Any false allegations regarding the amount of money with which to fund a plan go to the validity of the Confirmation Order and not to the validity of the Temporary Allowance Order.[11] Finally, even were we were to find the voting tainted, in the absence of a timely appeal of the Confirmation Order, there is no relief we could fashion that could address the alleged harm.[12]

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[10] Section 1129(b) contemplates the treatment of impaired classes. By definition, an impaired class is one whose rights are altered under the plan. In pertinent part, § 1124 provides:

> Except as provided in section 1123(a)(4) of this title, a class of claims or interest is impaired under a plan unless, with respect to each claim or interests of such class, the plan -
> (1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitled the holder of such claim or interest ... .

11 U.S.C. § 1124(1).

[11] Armstrong further argues that Steppes filed liens in bad faith and therefore should be precluded from the equitable relief awarded in the Confirmation Order. Because the Confirmation Order was not timely appealed, we do not have the jurisdiction to consider that argument.

[12] It is possible that even had an appeal of the Confirmation Order been timely, that appeal would have been determined to be moot. A mootness analysis in the bankruptcy context is different with respect to a Confirmation Order than a

Armstrong's next arguments cluster around the validity of the Temporary Allowance Order. First, he argues that this appeal is not moot, because under the Rooker-Feldman doctrine the bankruptcy court never had the jurisdiction to enter any orders relating to the Texas Modified Judgment, and therefore, this Court should reverse the Temporary Allowance Order and by extension, the Confirmation Order. The Rooker-Feldman doctrine bars "a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994). When determining whether the Rooker-Feldman doctrine applies, "'[t]he fundamental and appropriate question to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment.'" State of Missouri ex rel. Nixon v. Audley (In re Audley), 275 B.R. 383, 390 (10th Cir. BAP 2002) (quoting Collins v. Kansas, 174 F.Supp. 2d 1195, 1198 (D. Kan. 2001) (further quotation omitted)).

Armstrong's argument is premised on his

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constitutional analysis. Nationwide Mut. Ins. Co. v. Berryman Products, Inc. (In re Berryman Products, Inc.), 159 F.3d 941, 944 (5th Cir. 1998). An appellate court "may decline to consider the merits of confirmation when a plan has been so substantially consummated that effective judicial relief is no longer available-even though the parties may have a viable dispute on appeal." Id. Under Berryman, there is a three-part test when considering a dismissal of a challenge to reorganization plans: 1) whether a stay has been obtained; 2) whether the plan has been substantially consummated; 3) whether the relief requested would affect either the rights of parties not before the courts or the success of the plan. Id.

theory that in entering the Temporary Allowance Order, the bankruptcy court found him personally liable for the Texas Modified Judgment whereas the Texas Modified Judgment imposed liability only on the Trusts. Armstrong concludes that the bankruptcy court altered the Texas Modified Judgment and violated the Rooker-Feldman doctrine.[13] This syllogism is based on a misunderstanding of the Rooker-Feldman doctrine and what occurred in the proceedings below.

Clearly, the Rooker-Feldman doctrine prohibits federal courts from reviewing or changing a state court judgment. As Armstrong correctly states, under the terms of the Texas Modified Judgment, only the Trusts were liable for Steppes's Claims. However, the Steppes Claim permitted in the Temporary Allowance Order was not based on the Texas Modified Judgment, it was based on the Utah Default Ruling, a judgment against Armstrong in his personal capacity.

The bankruptcy court found, when considering Steppes's Claim, that under the collateral estoppel doctrine, it was precluded from revisiting the issues litigated in the Utah Default Ruling. Collateral estoppel, or issue preclusion, is a doctrine that prohibits the relitigation between the same parties of issues of ultimate fact that have been "determined by a valid and final judgment." Phelps v. Hamilton, 122 F.3d 1309, 1318 (10th Cir. 1997). Although the

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[13] Armstrong argues that the Texas Modified Judgment was unconstitutional because it assessed excessive penalties and violated federal law. These constitutional claims are inextricably intertwined with the state court judgment and in essence, Armstrong asks this Court for appellate review of a Texas court judgment. This is precisely what the Rooker-Feldman doctrine prohibits.

preclusive effect of a federal diversity judgment, the better federal rule is for the federal court to adopt "the law that would be applied by state courts in the State in which the federal diversity court sits." Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001). In Matosantos Commercial Corp. v. Applebee's International, Inc., 245 F.3d 1203 (10th Cir. 2001), the Tenth Circuit observed that while Semtek was a res judicata case, its reasoning arguably applies to collateral estoppel cases as well. Matosantos, 245 F.3d at 1208 (declining to decide whether federal or Puerto Rican collateral estoppel requirements applied to Matosantos's claim because the end result would be the same regardless of which collateral estoppel law was applied).

Utah collateral estoppel requirements are "'substantially the same as under federal law.'" Frandsen v. Westinghouse Corp., 46 F.3d 975, 978 (10th Cir. 1995) (quoting Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation, 975 F.2d 683, 687 n.5 (10th Cir. 1992)). In Utah, collateral estoppel will bar the litigation of a claim when the following four elements are met:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party [to] or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Id. In this Circuit, default judgments also have

preclusive effect. McCart v. Jordana (In re Jordana), 232 B.R. 469, 477 (10th Cir. BAP 1999) (finding "a default judgment entered against a defendant for abuse of the discovery process has preclusive effect in subsequent litigation."); accord Wolstein v. Docteroff (In re Docteroff), 133 F.3d 210 (3d Cir. 1997); Pahlavi v. Ansari (In re Ansari), 113 F.3d 17 (4th Cir. 1997); Gober v. Terra + Corp. (In re Gober), 100 F.3d 1195 (5th Cir. 1996); Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush), 62 F.3d 1319 (11th Cir. 1995); FDIC v. Daily (In re Daily), 47 F.3d 365 (9th Cir. 1995).

The bankruptcy court carefully went through each element of the Utah collateral estoppel doctrine and determined that the Utah Default Ruling prohibited the bankruptcy court from reconsidering any issues about liability that had already been raised in the Utah federal court.

Armstrong argues that element number three and element number four of the collateral estoppel doctrine were not met as he personally was never a party to the Texas Modified Judgment and he never had a full and fair opportunity to litigate any of the issues in the Texas Modified Judgment. However, Armstrong is confusing which ruling was at issue in the bankruptcy court. It was the Utah Default Ruling and not the Texas Modified Judgment that collaterally estopped the bankruptcy court from reconsidering the issue of whether Armstrong was personally liable to Steppes. Undeniably, Armstrong was a party in the Utah proceedings.

Alternatively, Armstrong argues that the Utah Default Ruling is not final because there was no written ruling entered and therefore, it is not entitled to preclusive effect. Case law provides otherwise. As cited by

the bankruptcy court in its ruling, the law provides that a ruling of a court, even when the ruling is a default judgment, is sufficiently final for purposes of preclusion. Jordana, 232 B.R. at 477. The fact that a ruling has not been memorialized in writing does not defeat the doctrine of collateral estoppel. Docteroff, 133 F.3d at 216 (finding that "[b]y filing a Chapter 11 bankruptcy petition and invoking the automatic stay [the debtor] prevented the district court from holding a trial on damages and entering final judgment [, and] [p]ermitting [the debtor] to relitigate the issue in light of his original rejection of a full and fair opportunity to litigate would implicitly endorse his abuse of the judicial process."). There is no error in the bankruptcy court's conclusions on this issue.

Second, Armstrong argues that the appeal is not moot because the Temporary Allowance Order is void as there was no constitutional notice to all affected parties, specifically, the Trusts and its beneficiaries, and because the bankruptcy court judge subsequently recused herself from all further proceeding in his case. We will address each argument in turn.

Rule 3018(a) states that "[n]otwithstanding any objection to a claim or interest, the court after notice and hearing may temporarily allow the claim ...." Fed. R Bankr. P. 3018(a). The bankruptcy code further defines notice as "such notice as is appropriate . . . ." 11 U.S.C. § 342(a). In this case, Armstrong received notice of the hearing, and he was present at the five-day hearing. However, Armstrong argues that because the Trusts were not noticed, their constitutional rights were violated, the mandates of the Bankruptcy Code were not observed, and the Temporary Allowance Order is

void.

As a preliminary matter, we are not certain in what capacity Armstrong is alleging a violation of due process as to the Trusts. If it is in Armstrong's individual capacity as the appellant to this appeal, he cannot invoke another's rights. Hackford v. Babbitt, 14 F.3d 1457, 1465 (10th Cir. 1994) (finding that ordinarily a party may not assert the rights of another to justify relief for himself or herself). If Armstrong is asserting the Trusts' rights in his capacity as the Trustee for the Trusts and in his capacity as the Trusts' beneficiary, then he is improperly doing so as the Trusts and its beneficiaries are not parties to this appeal.

However, assuming that this matter is properly before us, it is not clear why the Trusts or its beneficiaries should have been noticed. There is no evidence that either party had any interest in these proceedings.[14] The Temporary Allowance Order was by its terms confined to permitting Steppes to vote on the Trustee's Plan in Armstrong's Chapter 11 case. While the Trusts and its beneficiaries may be Armstrong creditors, that does not entitled them to notice under § 3018(a).

More important, while the Trusts and its beneficiaries may not have received formal notice, they certainly received constructive notice. Pursuant to the Code, the Trusts and its beneficiaries were due only such notice as is

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[14] Armstrong alleges that because the Confirmation Order contained an injunction against the Trusts and its beneficiaries that the Trusts were interested parties with respect to the Temporary Allowance Order. There is no apparent logical relationship between the Temporary Allowance Order and an injunction in the Confirmation Order, and we decline to construe one.

appropriate. Armstrong was the trustee of the Trusts. Armstrong is also the main beneficiary of the Trusts. It is undeniable that he was present at the temporary allowance hearing.

Finally, Armstrong argues that the Temporary Allowance Order is void or voidable because the bankruptcy court judge recused herself from further proceedings in his case. He cites Tramonte v. Chrysler Corp., 136 F.3d 1025, 1028 (5th Cir. 1998) for the proposition that if a judge should have recused herself, all subsequent orders are void. While Armstrong correctly cites the law, he misapplies it here.

The provisions governing recusal are found at 28 U.S.C. § 455, which delineates different circumstances under which a judge might recuse herself. Although Armstrong does not cite this statute, he appears to be contending that the bankruptcy judge should have disqualified herself because of partiality or bias. The provisions explaining partiality and bias provide in pertinent part:

> (a) Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding... .

28 U.S.C. § 455(a), (b)(1). "'The goal of section 455(a) is to avoid even the appearance of partiality.'" Liljeberg v. Heath Servs. Acquisition Corp., 486 U.S. 847, 860 (1988) (quoting Court of

Appeals decision, 796 F.2d 796, 802 (5th Cir. 1986)). The Tenth Circuit has stated that with respect to § 455(a) "the initial inquiry is whether a reasonable factual basis exists for questioning the judge's impartiality." Nichols v. Alley, 71 F.3d 347, 351 (10th Cir. 1995) (per curiam).

The test under 28 U.S.C. § 455(b) is whether "a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987) (per curiam). However, the recusal statute is not to be construed so broadly as to require recusal "based on unsubstantiated suggestions of personal bias or prejudice." Bryce, 289 F.3d at 659-60. As noted previously, orders entered prior to a recusal may be voided if the injured party can show that the judge should have recused herself and failed to do so. See Tramonte, 136 F.3d at 1028. An appellate court's review of this inquiry is fact driven. Bryce, 289 F.3d at 660.

Armstrong has not offered any evidence that the bankruptcy court judge should have recused herself from these proceedings, nor has he presented us with any evidence that he even requested recusal at any point. In the record before us, we have little evidence of events at the hearing on the Motion; Armstrong has provided this court with only thirteen pages of the hearing transcript, which, given the fact that the trial lasted five days, must be, in totality, hundreds of pages. The only fact in this case that Armstrong provides to support his allegations of partiality and bias is that the bankruptcy judge later recused herself from his proceedings. That fact is not enough to indicate bias in any proceeding prior to the recusal.

Both Rushton and Steppes argue that Armstrong's failure to supply an evidentiary record, namely a transcript of the hearing, is fatal to the appeal.[15] In the record before us, there is no evidence of the hearing other than the few previously

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[15] On May 20, 2002, Armstrong filed a Motion for Waiver of 10th Cir. BAP L.R. 8009-1(b) and Fed. R. Bankr. P. 8009(b) and For Permission to File Overlength Initial Brief and Motion for Reconsideration of the Court's Ruling on Armstrong Providing Exhibits on Compact Disk ("Motion for Waiver"). Steppes objected to the Motion for Waiver on the grounds that the documents in Armstrong's appendix are largely irrelevant to the appeal and that Armstrong's request to provide his appendix to Steppes on the compact disc is really an attempt to shift the costs of the appeal to Steppes.

Although Armstrong's Motion for Waiver asks for waiver of all of the requirements of 10th Cir. BAP L.R. 8009-1(b) and Fed. R. Bankr. P. 8009(b), the body of the Motion for Waiver asks only for waiver of the requirements with respect to pagination and chronological order. Therefore, we grant Armstrong's Motion for Waiver on the following issues: waiver of the pagination requirements under 10th Cir. BAP L.R. 8009-1(b)(3); waiver of the chronological order requirements as delineated in 10th Cir. BAP L.R. 8009-1(b)(4); and permission to file an overlength brief. We deny Armstrong's Motion for Waiver on the issue of whether we will reconsider our previous ruling in an Order entered on April 3, 2002, that the appendix could be served on a compact disc to the appellees only with their consent.

In its brief, Steppes also makes the following objections concerning Armstrong's appendix: the appendix contains documents not in the record before the bankruptcy court; some of the items in the appendix were not admitted in the hearing and therefore are not part of the evidentiary record; some of the exhibits in the appendix are incomplete; some of the items in the appendix have been altered or modified or both; some of the items in the appendix are not evidence but legal authorities; and exhibit number 54 has been altered to include information that was not in the original document. We conclude that any errors in Armstrong's Appendix are insignificant given the outcome of this appeal.

mentioned pages of transcript from one day of the relevant hearing and the bankruptcy judge's findings of fact and conclusions of law.[16]

The burden of providing an appellate court with an adequate record for review is on the appellant. Fed. R. App. P. 10(b)(2). Such a record will include "all transcripts, or portions of transcripts, necessary for the court's review." 10th Cir. BAP L.R. 8009-1(b)(5). The pertinent inquiry is whether the record provided "discloses the factual and legal basis of the trial court order to allow appellate review." Knowles Bldg. Co. v. Zinni (In re Zinni) , 261 B.R. 196, 202 (6th Cir. BAP 2001).

Armstrong argues that the bankruptcy court abused its discretion in the Temporary Allowance Order for the following reasons: (1) the bankruptcy court denied him a full and fair opportunity to be heard; (2) the bankruptcy court improperly denied the admission of evidence and documents or improperly allowed evidence and documents, or both; (3) the bankruptcy judge refused to consider Armstrong's offsets and counterclaims against Steppes; and (4) the bankruptcy court was biased and partial against him.[17] All of these claims rely on events that

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[16] Armstrong has filed a Motion for Extension of Time to File a Reply Brief and to File and Overlength Reply Brief ("Motion to Extend Time"). We grant his Motion to Extend Time on both issues.

[17] In this appeal, Armstrong argues that the bankruptcy court also erred with respect to the following issues: (1) that a previous bankruptcy court found that in its pleadings Steppes had not pled with sufficient specificity under Federal Rule of Civil Procedure 9; (2) that Steppes's liens are wrongful liens; (3) that Steppes has made many of the arguments they made in this case in the MPV case

occurred during the hearing. None of those claims can be supported by evidence in the actual Temporary Allowance Order, which, in sixty-three pages, carefully delineates the factual and legal bases for the bankruptcy court's decision. Armstrong's failure to provide this Court with the pertinent transcript thwarts any attempt by this Court to apply the abuse of discretion standard with respect to the hearing and the ensuing Temporary Allowance Order.

Armstrong argues that he should not be required to supply a complete transcript as he cannot afford to pay for it. Under 28 U.S.C. § 753(f) an appellant may apply for a court to pay for the transcripts in an appeal. However, there are two preliminary requirements: the person must have been permitted to proceed in forma pauperis[18] and the trial judge must certify that the appeal is not frivolous. 28 U.S.C. § 753(f). Armstrong has not met the requirements of either step. Consequently, the burden was on Armstrong, regardless of his ability to pay, to proved a record sufficient for our review.[19] "'[I]t is counsel's responsibility to see that

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and MPV bankruptcy court ruled against Steppes. These arguments are based on rulings that were entered in the MPV case and are irrelevant to this appeal.

[18] In another case, on a motion to proceed in forma pauperis, a panel of this Court found that because the Bankruptcy Appellate Panel is not an Article III court, it does not have the power to grant leave to proceed in forma pauperis. A panel of this Court reasoned that because leave to prosecute an action in forma pauperis is governed by 28 U.S.C. § 1915(a), which provides that such leave may be granted by a "court of the United States" and the Tenth Circuit has held that the definition "court of the United States" provided in 28 U.S.C. § 451 refers only to Article III courts, this Court has no authority to grant such leave.

[19] In the designation of record, Armstrong indicated that he intended to file a transcript of the hearing.

the record excerpts are sufficient for consideration and determination of the issues on appeal and the court is under no obligation to remedy any failure of counsel to fulfil that responsibility.'" Rubner & Kutner, P.C. v. United States Trustee (In re Lederman Enters., Inc.), 997 F.2d 1321, 1323 (10th Cir. 1993) (quoting Deines v. Vermeer Mfg. Co., 969 F.2d 977, 979 (10th Cir.1992) (further citation omitted)).

As a general rule, the Tenth Circuit has held that the failure to provide a trial transcript on appeal warrants affirming the trial court when the issue on appeal requires the appellate court to review the record in the trial court. McGinnis v. Gustafson, 978 F.2d 1199, 1201 (10th Cir. 1992); see also In re Rambo, 209 B.R. 527, 530 (10th Cir. BAP), aff'd without published opinion, 132 F.3d 43 (10th Cir. 1997). The rule is appropriate because when an appellant has failed to provide a reviewing court with an adequate record, the appellant has failed to provide evidentiary support for his or her appellate argument. McGinnis, 978 F.2d at 1201 (finding that the appellant's failure to include a transcript of the district court's oral ruling "raises an effective barrier to informed, substantive appellate review"). However, an appellate court is not limited to that remedy alone because under Federal Rule of Bankruptcy Procedure 8001, a district court or a bankruptcy appellate panel has the discretion to take that action it "deems appropriate, which may include dismissal of the appeal." Fed. R. Bankr. P. 8001. We conclude that in the absence of a complete transcript and given our determination that this

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Subsequently, Armstrong filed a motion in this appeal requesting an extension of time to obtain and to file a transcript. On April 3, 2002, a panel of this Court granted that motion. Under these circumstances, we are puzzled by Armstrong's failure to produce an appropriate transcript for this appeal.

appeal is moot, we must affirm the Temporary Allowance Order.

IV. Conclusion

For the reasons stated above, the Temporary Allowance Order is AFFIRMED.

APPENDIX K

1. U.S.C.A. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S.C.A. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. U.S.C.A. Const. Amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. U.S.C.A. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. 11 U.S.C.A. § 704

§ 704. Duties of trustee

The trustee shall--

(2) be accountable for all property received;
(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;
(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and
(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

6. § 1106. Duties of trustee and examiner

(a) A trustee shall--

(1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title;
(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;
(3) except to the extent that the court orders otherwise,

investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable--

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;

(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case;

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information; and

(7) after confirmation of a plan, file such reports as are necessary or as the court orders.

7. Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without

order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

8. V.T.C.A., Civil Practice & Remedies Code § 41.004

(a) Except as provided by Subsection (b), exemplary damages may be awarded only if damages other than nominal damages are awarded.

(b) Exemplary damages may not be awarded to a claimant who elects to have his recovery multiplied under another statute.

9. 11 U.S.C.A. § 105(a)

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

10. 11 U.S.C.A. § 524(e)

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

11. Federal Rules of Bankruptcy Procedure, Rule 4007

(c) Time for filing complaint under § 523(c) in a chapter 7 liquidation, chapter 11 reorganization, or chapter 12 family farmer's debt adjustment case; notice of time fixed

A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

12. TX FIN 305.008. Criminal Penalty

(a) A person commits an offense if the person contracts for, charges, or receives interest on a transaction for personal, family, or household use that is greater than twice the amount authorized by this subtitle.

(b) An offense under this section is a misdemeanor punishable by a fine of not more than $1,000.

14. 11 U.S.C.A. § 1129 (a)(7)(A)(ii) and (b)

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

15. Bankruptcy Rule 3007. Objections to Claims

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

16. Bankruptcy Rule 9006(f). (f) Additional time after service by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ.P.

When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days shall be added to the prescribed period.

APPENDIX L

ENTERED
May 8, 1997
THOMAS A. WILDER
DISTRICT CLERK
TARRANT COUNTY TEXAS

No. 67-156473-94

STEPPES APARTMENTS, LTD. Plaintiff, and JOHN L. FEECE, Intervenor Plaintiff, v. DONALD E. ARMSTRONG, TRUSTEE OF THE DONALD E. ARMSTRONG FAMILY TRUST AND THE DONALD E. ARMSTRONG CHARITABLE REMAINDER UNITRUST, Defendant.	IN THE DISTRICT COURT TARRANT COUNTY, TEXAS 67TH JUDICIAL DISTRICT

MODIFIED JUDGMENT

ON THE 19th day of August, 1996, came on to be heard the above-styled and numbered cause. The Plaintiff, The Steppes Apartments, Ltd., appeared by and through its duly authorized representatives and its attorney of record. The Intervenor, John Feece, appeared in person, and by and through his attorney of record. The Defendant, Donald E. Armstrong, as Trustee of The Donald E. Armstrong Family Trust (the "Family Trust") and the Donald E. Armstrong Charitable Remainder Unitrust (the "Unitrust") appeared in person, and by and through his attorney of record.

The Plaintiff and the Intervenor announced ready. The Defendant as Trustee for the Unitrust and the Family Trust filed a Plea to the Jurisdiction to the Court or In the Alternative Plea in Abatement or Motion for Continuance.

The Court considered the Defendant's Plea to

the Jurisdiction of the Court or In the Alternative Plea in Abatement or Motion for Continuance. The Court found that the Court was entitled to proceed to the final exercise of jurisdiction over the subject matter of this suit despite the transfer of the two Notes made the subject of this suit by the Defendant to Wasatch Growth, L.L.C. ("Wasatch"), and Summit Growth, Inc. ("Summit"). The Court also found that the transfer by the Defendants pendente lite is subject to the lis pendens doctrine. Consequently, the Court finds that Summit and Wasatch are not necessary parties to this litigation, and that Defendant's Plea to the Jurisdiction to the Court or In the Alternative Plea in Abatement or Motion for Continuance should be DENIED.

IT IS, THEREFORE, ORDERED that Defendant's Plea to the Jurisdiction to the Court or In the Alternative Plea in Abatement or Motion for Continuance be and it is hereby DENIED.

No party having requested a trial by jury, the Court proceeded to hear the case. After the Court heard the evidence and rendered judgment in this cause on September 23, 1996, the Defendant, Donald E. Armstrong, Trustee of the Donald E. Armstrong Family Trust and the Donald E. Armstrong Charitable Remainder Unitrust, objected to the entry of judgment because of the failure of the Plaintiff to give notice to those persons or entities interested in the Donald E. Armstrong Family Trust and the Donald E. Armstrong Charitable Remainder Unitrust ("the Trust Estates") of this action pursuant to § 115.015 et seq., of the Texas Trust Code. Having considered the Defendant's objection, this Court vacated the previous judgment and ordered that Plaintiff give notice of this proceeding to those persons or entities interested in the trust estates. The Court also ordered those persons or entities interested in the trust estates to appear and show cause why this judgment should not be entered

("the Show Cause Hearing").

Thereafter, the Plaintiff and Intervenor served notice of the Show Cause Hearing by personal service and by certified mail, return receipt requested to those persons or entities interested in the Trust Estates. The Clerk of the Court also served the persons or entities interested in the Trust Estates with a Show Cause Order by certified mail, return receipt requested.

On the 31st day of March 1997 came on be heard the Show Cause Hearing. Donald E. Armstrong appeared in person and through his attorney of record both as trustee of the Trust Estates and as a person or entity interested in the Trust Estates. Jennifer Potter and Jerry B. James appeared in person and through their attorney of record asserting to be persons interested in the Trust Estates. The National Ability Center and the Boy's Club of San Diego appeared through their attorney of record. The Attorney General of the State of Texas waived notice of the Show Cause Hearing. Rosa Vasquez and Antoinette Vasquez Armstrong, as persons or entities interested in the Family Trust estate, did not appear at the Show Cause Hearing to contest the entry of judgment. Norman Nouskajian, as a person or entity interested in the Family Trust made no appearance and has made no appearance in this cause. John L. Feece appeared in person and through his attorneys of record on behalf of Plaintiff and the Intervenor. After hearing the evidence and argument of counsel, the Court is of the opinion and finds that the Proposed Modified Judgment previously served upon the persons or entities interested in the trust estates should be entered because the persons or entities interested in the Trust Estates failed to show cause as to why judgment in this case should not be entered.

IT IS, ACCORDINGLY, ORDERED, ADJUDGED, DECREED and DECLARED as follows:

1. Plaintiff substantially performed its obligations under the two Notes made the subject of this lawsuit and all liens securing their payment.

2. Defendant, Donald E. Armstrong, as Trustee of the Unitrust, is not entitled to accelerate the unpaid principal and interest balance of the Note made by Plaintiff on September 29, 1994, payable to the Order of the Unitrust ("The Unitrust Note"), in the original principal amount of $1,071,500.00, as of November II, 1994.

3. The Defendant, Donald E. Armstrong, as Trustee of the Family Trust, is not entitled to accelerate the unpaid principal balance of the Promissory Note made by Plaintiff on September 29, 1994, payable to the Order of the Family Trust ("The Family Trust Note") in the original principal amount of $375,250.00 as of November 11, 1994.

4. Defendant, as Trustee for both the Family Trust and the Unitrust does not now and has never had the right to impose a seven percent (7%) late charge on the unpaid principal balance of the Unitrust Note and the Family Trust Note.

5. IT IS, FURTHER ORDERED, ADJUDGED, and DECREED that Defendant, Donald E. Armstrong, as Trustee of the Unitrust, forfeit all principal as well as interest under the Unitrust Note.

6. IT IS, FURTHER ORDERED, ADJUDGED, and DECREED that Defendant, Donald E. Armstrong, as Trustee of the Family Trust, forfeit all principal as well as interest under the Family Trust Note.

7. The Unitrust Note is hereby declared to be null and void, and of no force and effect. Similarly, the Deed of Trust recorded in Volume 11743 at Page 0750 of the Deed of Trust Records of Tarrant County, Texas as well as all other liens securing the payment of such Note, is hereby declared null and void, and of no force and effect. Plaintiff owns the real property described on Exhibit "A" attached hereto free and clear of any liens securing the Unitrust Note.

8. The Family Trust Note is hereby declared null and void and of no force and effect. Similarly, the Deed of Trust recorded in Volume 11743 at Page 0775 of the Deed of Trust Records of Tarrant County, Texas, as well as all other liens securing payment of the Note to the Family Trust, are hereby declared null and void, and of no force and effect. Plaintiff owns the real property described on Exhibit "A" attached hereto free and clear of any liens securing the Family Trust Note.

9. Plaintiff have and recover judgment of and from Defendant, Donald E. Armstrong, as Trustee of the Unitrust (but not individually), in the amount of $495,783.22 as follows:

a. $160,864.65 representing three times the amount of usurious interest contracted for, charged or received as defined in Article 5069-1.06(1) V.A.T.S.;

b. $334,918.57, representing all amounts paid as principal as well as interest and all other charges on the Unitrust Note (which includes unused tax and insurance impounds and other sums paid into the Registry of this Court).

10. Plaintiff have and recover judgment of and from Defendant, Donald E. Armstrong, in his capacity as Trustee of the Family Trust (but not individually), in the amount of $391,128.62 as follows:

a) $61,353.18, representing three times the amount of usurious interest contracted for, charged, or received under the Note made payable to the Family Trust, as defined in Article 5069-1.06(1);

b) $329,775.44, representing all amounts paid as principal as well as interest and all other charges paid on the Family Trust Note (which includes sums paid on the Family Trust Note in the Registry of the Court).

11. The Clerk of this Court is hereby ordered to deliver to Plaintiff, the sum of

$138,861.34, together with interest earned on all funds deposited in the Registry of the Court. Donald E. Armstrong, in his capacity as Trustee of the Unitrust, is entitled to a credit of $49,036.26, together with interest earned on sums paid into the Registry of the Court on the judgment against him described in Paragraph 9 above upon the Clerk's payment as provided herein. Defendant, Donald E. Armstrong, in his capacity as Trustee of the Family Trust is entitled to a credit of $89,825.08 together with interest earned on sums paid into the Registry of the Court on the judgment against him described in Paragraph 10 above upon the Clerk's payment as provided herein. The District Clerk's delay of thirty (30) days in disbursing such funds is waived.

12. Plaintiff have and recover joint and several judgment against Donald E. Armstrong, in his capacity as Trustee of both the Unitrust and the Family Trust (but not individually), in the amount of $435,301.90, as reasonable and necessary attorneys fees for services rendered through time of trial.

13. Plaintiff have and recover joint and several judgment against Donald E. Armstrong, in his capacity as Trustee of both the Unitrust and the Family Trust (but not individually), the sums listed below as reasonable and necessary attorney fees for services rendered in the following circumstances:

$10,000.00 - in the event that Defendant files post-judgment motions, but such motions are denied by the trial court;

$30,000.00 - in the event that Defendant files an appeal to the Fort Worth Court of Appeals, but such appeal is unsuccessful;

$20,000.00 - in the event that Defendant files an Application for Writ of Error in the Supreme Court of Texas, but such application is not granted;

$10,000.00 - in the event the Application for Writ of Error to the Supreme Court of Texas is granted, but the appeal to Supreme

Court of Texas is unsuccessful;

$15,000.00 - in the event that Defendant files a Petition for Writ of Certiorari in the United States Supreme Court, but such petition is not granted;

$10,000.00 - in the event a Petition for Writ of Certiorari is granted, but the appeal to the United States Supreme Court is unsuccessful.

14. Defendant take nothing by virtue of its claims against Plaintiff and intervenor, and all affirmative relief sought by Defendant against Plaintiff and Intervenor is DENIED.

15. Defendant, Donald E. Armstrong as Trustee of both the Unitrust and the Family Trust, his agents, servants, employees and attorneys, be, and they are hereby permanently restrained and enjoined from: (i) declaring Plaintiff in default, and enforcing the Unitrust and Family Trust Notes (and the liens securing their payments), (ii) taking any action to collect the Unitrust and Family Trust Notes, and (iii) from prosecuting or seeking any relief in Cause No. CV-754507 filed in the Superior Court of Santa Clara County, California, styled Donald E. Armstrong, Trustee of the Donald E. Armstrong Family Trust and the Donald E. Armstrong Charitable Remainder Unitrust v. John L. Feece and Does 1 thru 20, against Plaintiff and Intervenor in any manner, or instituting or prosecuting any similar action against Plaintiff, (or any of its partners, including John L. Feece, Intervenor), which involves the Unitrust and Family Trust Notes, and (iv) foreclosing on the real property described in Exhibit "A" attached hereto or attempting to appoint a receiver or attempting to enforce any assignment of rents.

16. All costs of Court herein are taxed against the Defendant.

17. All writs and processes for the enforcement and collection of this Judgment or the costs of court may issue as necessary.

18. All other relief not expressly granted in

this Judgment is DENIED

19. This Judgment shall bear interest at the rate of 10% per annum from the date hereof.

SIGNED this 8TH day of May 1997.

\s\

JUDGE PRESIDING

Exhibit "A"

Lot D, Block 3, RIDGMAR PLAZA, an Addition to the City of Fort Worth, Tarrant County, Texas, according to plat recorded in Volume 388-26, Page 77, Deed Records of Tarrant County, Texas.
AND
Lot E, Block 3, RIDGMAR PLAZA, an Addition to the City of Fort Worth, Tarrant County, Texas, according to plat recorded in Volume 388-45, Page 84, Deed Records of Tarrant County, Texas.
AND
Part of Lot 16, Block 9, RIDGMAR, an Addition to the City of Fort Worth, Tarrant County, Texas, according to plat recorded in Volume 388-36, Page 30, Deed Records of Tarrant County, Texas, and being more particularly described as follows:
BEGINNING at the West corner of said Lot 16;
THENCE North 46 degrees 37 minutes East with the Northwest line of said Lot 16, 149.7 feet to the North corner of said Lot 16 a point on a curve in the Northeast line of said lot and in the Southwest line of Taxco Road from which the center of said curve bears South 46 degrees 42 minutes West 722.53 feet;
THENCE Southeasterly with said curve through a central angle of 3 degrees 22 minutes for a distance of 42.3 feet to the end of said curve;
THENCE continuing with said street and lot line South 39 degrees 56 minutes East 22.7 feet; THENCE South 52 degrees 09 minutes West 154.8 feet to a point on the Southwest line of said lot;
THENCE North 35 degrees 23 minutes West with said lot line 50.5 feet to the PLACE OF BEGINNING;
And being part of the property conveyed to George M. Underwood, Jr. and George M. Underwood, III by deed from J. C. Pace, Jr., dated March 1, 1972, recorded in Volume 5199, Page 925, Deed Records of Tarrant County, Texas.

APPENDIX M
IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH

ENTERED
UNITED STATES
BANKRUPTCY COURT
DISTRICT OF UTAH
SEPTEMBER 7, 2001
WILLIAM C. STILLGEBAUER
CLERK OF COURT
BY: DEPUTY CLERK

In re MOUNTAIN PACIFIC VENTURES, INC., Debtor.	Bankruptcy Case No. 99-2218 Chapter 11
ROGER G. SEGAL, Chapter 11 Trustee of the bankruptcy estate of MOUNTAIN PACIFIC VENTURES, INC., Plaintiff, v. STEPPES APARTMENTS, LTD. and Does 1 through 6 inclusive, Defendants.	Adv. Proceeding 99-2218 ORDER GRANTING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT

FACTS

In 1996, a Texas State Court entered a judgment against the Donald E. Armstrong Family Trust (the "Family Trust") and in favor of Steppes Apartments Ltd. ("Steppes") for violation of Texas usury laws. It ruled that notes totaling over $1,300,000.00 could not be collected by the Family Trust and awarded Steppes a judgment of $391,128.62 plus $530,301.90 in attorney fees.

In August of 1997, Steppes commenced an action in the United States District Court for the District of Utah naming only Donald Armstrong ("Armstrong") and the Family Trust as defendants.

On May 5, 1998, Steppes filed a motion with the United States District Court seeking leave to amend its complaint.

On May *6,* 1998, Steppes recorded a lis pendens in Summit County against the property owned by Armstrong, Willow Brook Cottages, LLC, and against all property owned by Mountain Pacific Ventures, Inc. ("MPV") located in Summit County.

On May 7, 1998, counsel for MPV wrote to counsel for Steppes, asking that Steppes immediately release or correct the lis pendens.

On June 18, 1998, the United States District Court granted Steppes' motion for leave to file amended complaint.

On June 18, 1998, Steppes filed its amended complaint which, among other things, added MPV as a defendant.

The amended complaint identifies numerous parcels of real property located in Summit County, Utah, and seeks, in part, a judgment that real property which is property of the MPV estate be declared as vested in the Family Trust, that any fraudulent transfer of property to MPV be avoided, for damages against MPV and others, for an injunction against the MPV prohibiting the transfer or disposition of MPV's property, for the issuance of a declaratory judgment that MPV and others are alter egos of each other, for a declaratory judgment that Steppes' modified judgment is applicable to MPV and others, for the imposition of a constructive trust against MPV and others, and for an award of attorney fees and costs against MPV and others.

On March 10, 1999, MPV filed a Chapter 11 petition before this Court as case # 99C-22588.

On June 6, 1999, MPV initiated this adversary proceeding to have Steppes' lis pendens declared void or voidable as a wrongful lien and for a judgment declaring that Steppes has no claim against MPV or the estate of MPV.

On June 30, 1999, Steppes filed its proof of claim in this case. The proof of claim contains a five-page summary describing Steppes' theory of recovery including fraudulent transfer, civil conspiracy, abuse of the corporate entity /alter ego, ownership interest, constructive trust and other claims. The five-page summary refers to and incorporates a copy of Steppes' amended complaint filed in the United States District Court on June 18, 1998, as a source of many of the facts and causes of action underlying Steppes' claim/interest. The five-page summary and the amended compliant both contain numerous allegations that Armstrong was either the originator of or an intermediary of certain fraudulent transfers, civil conspiracies, instrumental in abuse of corporate entity, or an intermediary in a fraudulent transfer of stock. Other than the allegations involving Armstrong, the five-page summary and the amended complaint contain few specific allegations that are stated with particularity.[1]

On July 12, 1999, Roger G. Segal ("Segal") was appointed to serve as the Chapter 11 trustee of the MPV bankruptcy proceeding.

On June 15, 2000, Armstrong filed personal bankruptcy under Chapter 11 of the Bankruptcy

---

[1] Although Steppes' amended complaint contains seven causes of action including theories of alter ego, conspiracy, unjust enrichment, and constructive trust, each of Steppes' theories sound in fraud and are subject to the pleading requirements of Rule 9(b) as incorporated by F.R.B.P. 7009.

Code and was assigned case no. 00-26592.

On July 21, 2000, Segal filed a motion for summary judgment in this adversary proceeding seeking an order disallowing Steppes' claim against the bankruptcy estate of MPV and arguing that Steppes' lis pendens was a wrongful lien.

On September 13, 2000, Kenneth Rushton ("Rushton") was appointed as the Chapter 11 trustee in the Armstrong bankruptcy proceeding.

In October 2000, the Honorable Judith A. Boulden, ruled in the Armstrong bankruptcy proceeding, in part, that:

a. Steppes' proceeding on an alter ego action that is an asset of the debtor's bankruptcy estate would be a violation of the automatic stay;

b. Steppes' proceeding on a conspiracy theory, which would be an asset of the debtor's bankruptcy estate, would be a violation of the automatic stay;

c. To the extent of the transfers which were made directly from Mr. Armstrong to Mountain Pacific Ventures, Inc., Steppes' proceeding on a fraudulent conveyance action would be a violation of the automatic stay; and

d. Steppes' further proceeding in the Mountain Pacific Ventures, Inc. case would be a violation of the automatic stay.

On February 7, 2001, Steppes filed a cross motion for summary judgment on Segal's first cause of action seeking a ruling that Steppes' lis pendens was not a wrongful lien.

On April 17, 2001, Rushton filed a motion to intervene in this adversary proceeding arguing that as the trustee of the Armstrong bankruptcy estate, he has the sole right to seek recovery of property fraudulently

conveyed from Armstrong to MPV.

On May 23, 2001, Rushton's motion to intervene in this adversary proceeding was granted.

ANALYSIS

The propriety of filing a notice of lis pendens from a federal lawsuit is a matter governed by state law. Hamilton v. Smith, 80 F.2d 36 (10th Cir. 1986). Utah Code Annotated § 78-40-2 states as follows:

> In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

The statute is specific in its requirements. One is only permitted to file a lis pendens "at the time of filing the complaint or thereafter." Steppes filed its lis pendens on May 6, 1998, a full forty-two days prior to filing the amended complaint naming MPV as a defendant. The statute does not permit the filing of a lis pendens prior to the filing of the complaint. At the time Steppes filed its lis pendens against the MPV's property, MPV was not even a party to the lawsuit. Steppes' filing of a motion for leave to file amended complaint does not satisfy the requirements of U.C.A. § 78-

40-2. The motion for leave to file amended complaint did not make MPV a party to any lawsuit and did not make MPV's property the subject of a pending lawsuit wherein title to, or possession of MPV's property was put into controversy. A lis pendens that is not supported by a pending legal action is wrongful. Birch v. Fuller, 337 P.2d 964 (Utah 1959). The sole purpose of recording a notice of lis pendens is to give constructive notice of the pendency of the lawsuit. A lis pendens' only foundation is the legal action; it has no existence independent of it. Hansen v. Kohler, 55 P.2d 186 (Utah 1976). Further, a lis pendens that is wrongfully filed because it lacks a pending lawsuit to support it cannot be cured by the subsequent filing of a lawsuit. Winters v. Schulman, 977 P.2d 1218 (Utah App. 1999). Steppes' filing of a lis pendens against MPV's property prior to amending its complaint to name MPV as a party defendant was wrongful. Liability for such a wrongful lis pendens can be sought pursuant to Utah Code Annotated § 78-40-2. Winters v. Schulman, 2001 WL 357124 (Utah App. 2001).

STEPPES' PROOF OF CLAIM

Steppes' proof of claim seeks recovery under a number of theories that originate with Armstrong or involve Armstrong as an intermediary. Theories that involve Armstrong in such a way belong solely to Rushton, the trustee of the Armstrong bankruptcy estate, who holds the exclusive right to all property of the estate including all avoiding powers. For Steppes to proceed on an alter ego theory, conspiracy theory, fraudulent transfer theory, or other further proceeding that is property of the Armstrong's estate is a violation of the automatic stay. *See In re Donald E. Armstrong, No. 00-26592 (Bankr. D. Utah, October 31,* 2000).

Having determined that any theory of recovery that originates in Armstrong or involves Armstrong as an intermediary belongs solely to Rushton, the Court must now determine what remains of Steppes' claim in this bankruptcy

proceeding. The Court finds that it is not possible to determine what remains of Steppes' claim after deleting the Armstrong causes of action. This is because Steppes' proof of claim lacks sufficient detail to enable the Court to make such a determination. A complaint sounding in fraud must set forth the time, place, and contents of the fraudulent activity, the identity of the party involved in the fraudulent activity, and the consequences thereof. Rule 9(b)'s purpose is to provide notice of plaintiff's claims and the factual ground upon which they are based. A statement that alleges that misrepresentations were made and continue to the present time does not alert defendants to a sufficiently precise time frame to satisfy Rule 9(b) requirements. Koch v. Koch Industries, Inc., 203 F.3d 1202 (10th Cir. 2000). Once the causes of action belonging to Armstrong's bankruptcy estate are removed from Steppes' proof of claim, what remains of Steppes' claim is so vague and lacking in detail that it fails to meet the requirements of F.R.B.P. 9(b) and will be denied if not promptly amended.

Based upon the above, it is hereby

ORDERED that because Steppes' lis pendens does not comply with the requirements of Utah Code Annotated § 78-40-2, the lis pendens was wrongfully filed and is invalid, and it is further

ORDERED that Steppes' causes of action that either originate with Armstrong or involve Armstrong as an intermediary are disallowed, and it is further

ORDERED that the remainder of Steppes' proof of claim is denied for failure of Steppes to plead its claim with sufficient particularity. However, Steppes will be given fifteen days from the date of this Order to amend its proof of claim in a way consistent with this Order and to plead its claim with sufficient particularity to satisfy the requirements of F.R.B.P 7009, and it is further

ORDERED that upon being served with Steppes' amended claim, Segal shall have sixty days to object to the

amended claim if he so chooses.

DATED this _7_ day of September, 2001.

BY THE COURT:

/s/
GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

APPENDIX N

CALLISTER NEBEKER & McCULLOUGH
JEFFREY L. SHIELDS (2947)
ZACHARY T. SHIELDS (6031)
Gateway Tower East Suite 900
10 East South Temple
Salt Lake City, Utah 84133
(801) 530-7300
(801) 364-9127 Fax

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH
CENTRAL DIVISION
Entered on Court Docket on
May 6, 1998

* * * * * * * *

STEPPES APARTMENTS, LTD., Plaintiff, vs. DONALD E. ARMSTRONG, Individually; DONALD E. ARMSTRONG, TRUSTEE OF THE DONALD E. ARMSTRONG FAMILY TRUST; And MOUNTAIN PACIFIC VENTURES, INC., a Utah Corporation, Defendants	**LIS PENDENS** No. 2-97-CV-663 Judge David Sam

* * * * * * * *

NOTICE IS HEREBY GIVEN that Plaintiff Steppes Apartments, Ltd., ("Steppes") has commenced an action in the above-entitled Court against Defendants DONALD E. ARMSTRONG, Individually, ("Armstrong"), and DONALD E.

ARMSTRONG, TRUSTEE OF THE DONALD E. ARMSTRONG FAMILY TRUST (the "Family Trust"). Plaintiff Steppes has submitted an AMENDED COMPLAINT to the Court and has filed a motion for leave to file the Amended Complaint and a memorandum in support of the motion. Defendants in the the Amended Complaint are Armstrong, the Family Trust, as well as MOUNTAIN PACIFIC VENTURES, INC., a Utah Corporation ("MPV").

The Amended Complaint seeks, among other things, avoidance of the transfers of certain parcels of real property located in Summit County, State of Utah, and a Declaratory Judgment that, effective May 21, 1997, a Judgment in favor of Plaintiff, in the amount of $826,430.52 plus interest, attached as a judgment lien upon all real property located in Summit County owned by Armstrong, the Family Trust, and/or MPV -- whether such real property was owned by Armstrong, the Family Trust, and/or MPV on May 21, 1997 or at any time thereafter.

The above-captioned legal action seeks to enforce a lien encumbrance upon, and/or otherwise affects the title to and possession of, all real property located in Summit County owned by Armstrong, the Family Trust, and/or MPV -- whether such real property was owned by Armstrong, the Family Trust, and/or MPV on May 21, 1997 or at any time thereafter. Such real property includes, but is not necessarily limited to, the following:

> Lot 5, American Flag Subdivision, according to the official plat thereof, recorded April 16, 1980 as Entry No. 165808 of the official records in the office of the Summit County Recorder.
>
> Lots 1, 2, 5, 12, & 13 WILLOW DRAW COTTAGES AT SUN PEAK, PLAT F, according to the official Plat thereof, recorded

December 4, 1996, as Entry No. 460653 of the official records in the office of the Summit County Recorder.

Lots 25 and 27, WILLOW DRAW COTTAGES AT SUN PEAK, PLAT E, according to the official Plat thereof, recorded July 16, 1996 as Entry No. 450215 of the official records of the Summit County Recorder.

Lot 14 WILLOW DRAW COTTAGES AT SUN PEAK, PLAT F, according to the official Plat thereof, recorded December 4, 1996, as Entry No. 460653 of the official records in the office of the Summit County Recorder.

BEGINNING AT A POINT ON THE SOUTH RIGHT OF WAY FENCE OF A COUNTY ROAD IN SNYDERVILLE, SUMMIT COUNTY, SAID TO THE POINT OF BEGINNING BEING SOUTH 1299.14 FEET AND EAST 1920.64 FEET FROM THE NORTHWEST CORNER OF SECTION 31, TOWNSHIP I SOUTH, RANGE 4 EAST, SALT LAKE BASE AND MERIDIAN, AND RUNNING THENCE SOUTH 89 DEGREES 44 MINUTES 00 SECONDS EAST ALONG SAID SOUTH RIGHT OF WAY FENCE 321.02 FEET; THENCE SOUTH 0 DEGREES 25 MINUTES 00 SECONDS WEST 981.91 FEET TO THE NEW BOUNDARY LINE AS DESCRIBED IN THAT CERTAIN BOUNDARY LINE AGREEMENT RECORDED NOVEMBER 27, 1990, IN BOOK 588, AT PAGE 93, THENCE SOUTH 86 DEGREES 16 MINUTES 26 SECONDS WEST 344.61 FEET; THENCE DUE NORTH 748.96 FEET; THENCE SOUTH 89 DEGREES 30 MINUTES 00 SECONDS WEST 9.60 FEET; THENCE NORTH 6 DEGREES 45

MINUTES 20 SECONDS EAST 4.37 FEET; .
THENCE SOUTH 89 DEGREES 28 MINUTES 00
SECONDS EAST 9.57 FEET TO A FENCELINE;
THENCE NORTH 6 DEGREES 45 MINUTES 20
SECONDS EAST ALONG SAID FENCELINE
252.19 FEET TO THE POINT OF BEGINNING.
EXCEPTING THEREFROM THAT
PORTION DEEDED TO UTAH
DEPARTMENT OF TRANSPORTATION IN
BOOK 641, AT PAGE 681.

DATED this 5th day of May, 1998.

CALLISTER NEBEKER & McCULLOUGH

By: /s/

Jeffrey L. Shields
Zachary T. Shields
Attorneys for Plaintiffs

STATE OF UTAH)
:ss.
COUNTY OF SALT LAKE)

On the 5th day of May, 1998, personally appeared before me Jeffrey L. Shields, who duly acknowledged to me that he executed the above Lis Pendens.

/s/
Nancy Jo. Potter
NOTARY PUBLIC

My Commfission Expires:
6/1/2001

Residing At:
Salt Lake City, Utah

Notary Public
Stamp
Appears Here

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **LIS PENDENS** was mailed, postage prepaid, on this 5th day of May, 1998 to the following:

Bradley L. Tilt,
McMURRAY, McMURRAY,
DALE & PARKINSON, P.C. The
Hermes Building
455 East 500 South, Suite 300
Salt Lake City, Utah 84111

E. Todd Crowley
134 South Main Street
Salt Lake City, Utah 84101

/s/
Jeffrey L. Shields

APPENDIX O

EXCERPTS FROM HEARING TRANSCRIPT
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

In re:)
MOUNTAIN PACIFIC VENTURES, INC.,)
Case No. 99-22588
Debtor.)

MOUNTAIN PACIFIC VENTURES,)
Plaintiff,)
vs.) Case No. 99-2218
STEPPES APARTMENTS, LTD.,)
Defendant.)

***

BEFORE THE HONORABLE GLEN E. CLARK

Thursday, May 24, 2001
1:30 P.M.
CROSS MOTIONS FOR SUMMARY JUDGMENT

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THE COURT: You began your reply memorandum by stating the present motion can be resolved by answering one question. Does Steppes' amended complaint affect the title to or possession of MPV's real property in Summit County. Then you go on to refer to the complaint. Which I've done as well because I'd like to find an easy answer if I can. You say -- you refer the court to three counts. Count I, fraudulent transfer. And you state that Count I of the amended

complaint alleges that MPV was the recipient of fraudulent transfers. So, -- ..... .

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THE COURT: Take your time with this question because it's been bothering me.

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And I couldn't find anything in Count IV that identifies any real property of MPV which was fraudulently or otherwise transferred to it. ....

THE COURT: That's fine but you don't allege any property, real property of MPV in Count III, I don't believe. I was just concentrating on the counts that you called my attention to.

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THE COURT: Fine. You'd like to have a judgment lien on all of Mountain Pacific's property. But it doesn't seem to me that this is an action -- with respect to Mountain Pacific is an action affecting title to or right of possession of real property. You want a money judgment against MPV that will allow you to get its property, isn't that true? .....

THE COURT: I know what you want in the complaint. But in addition what you've gotten for yourself is a prejudgment writ of attachment.

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APPENDIX P

FORM 17 NOTICE OF APPEAL UNDER 28 U.S.C. § 158(a) or (b) FROM A JUDGMENT, ORDER, OR DECREE OF A BANKRUPTCY COURT

FILED IN THE
UNITED STATES
BANKRUPTCY COURT
DISTRICT OF UTAH
FEB 12 9:07 A 02
WILLIAM C. STILLGEBAUER
CLERK OF COURT
BY: DEPUTY CLERK

In re DONALD E. ARMSTRONG Debtor Case No. 00-26592 Chapter 11	NOTICE OF APPEAL OR ORDER DATED JANUARY 31, 2002, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DATED JANUARY 31, 2002 CONFIRMATING AND APPROVING TRUSTEE'S SECOND REVISED PLAN OF REORGANIZATION DATED NOVEMBER 19, 2001 [Docket no. 573] AND GRANTING RELATED MOTIONS [Docket nos. 612, 613, and 695]

Donald E. Armstrong, Debtor Out of Possession and creditor, appeals under 28 U.S.C. §158(a) from the order of the bankruptcy court (FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DATED JANUARY 31, 2002, CONFIRMING AND APPROVING TRUSTEE'S SECOND REVISED PLAN OF REORGANIZATION DATED NOVEMBER 19, 2001

[Docket No. 573] AND GRANTING RELATED MOTIONS [Docket nos. 612, 613, and 695]) dated January 31, 2002.

The parties to the order appealed from and the names of their respective attorneys are as follows:

Kenneth A. Rushton is the Trustee of the Donald E. Armstrong Bankruptcy Estate and is represented by Penrod Keith of LeBoeuf Lamb Green & MacRae. Steppes Apartments, Ltd. Is a claimant and is represented by Jeffrey L. Shields and Zachary T. Shields of Callister Nebeker & McCullough. Pet Kuhn is with the U.S. Trustee's Office in Salt Lake City, Utah. Steven R. Bailey is the Trustee of the Willow Brook Cottages, L.L. C. and is represented by Duane H. Gillman of McDowell and Gillman. Donald E. Armstrong objected to the various motions and the Plan of Reorganization and is appealing the granting of the Plan of Reorganization and related motions. All of the creditors and parties in interest in the Donald E. Armstrong Bankruptcy Case No. 00-26592 may have an interest in these matters.

Signed: /s/
Donald E. Armstrong, Pro Se

Address: P.O. Box 1059
Park City, UT 84060
(435) 649-6477
Fax (435) 649-6470

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF APPEAL** was hand delivered or mailed, first class mail, postage prepaid, this 12th day of February 2002, to:

Jeffrey L. Shields
Callister, Nebeker & McCullough
10 East South Temple
Salt Lake City, UT 84133

Penrod W. Keith
LeBoeuf Lamb Greene & MacRae
1000 Kearns Building
136 South Main
Salt Lake City, UT 84101-1685

Duane H. Gillman
McDowell & Gillman
Twelfth Floor
50 West Broadway
Salt Lake City, UT 84101

Peter Kuhn
U.S. Trustee's Office
9 Exchange Place, Suite 100
Salt Lake City, UT 84111

/s/
Donald E. Armstrong, Pro Se